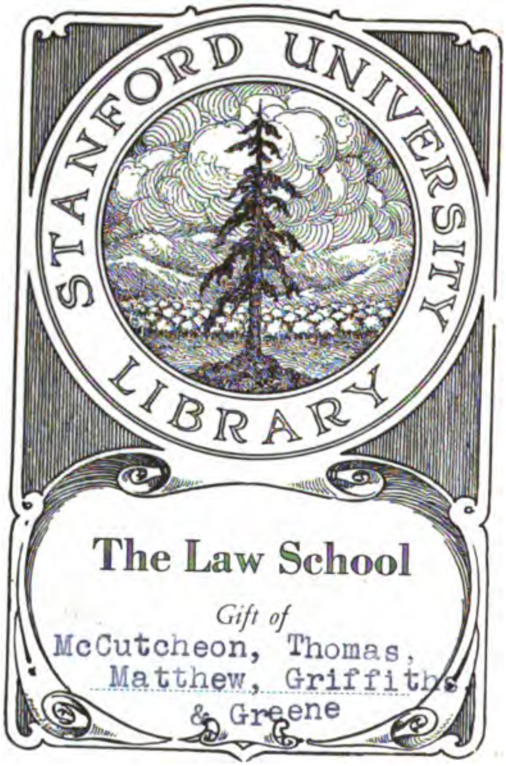

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BISHOP'S

NEW CRIMINAL PROCEDURE

VOL. I

NEW CRIMINAL PROCEDURE

OR

NEW COMMENTARIES

ON THE LAW OF

PLEADING AND EVIDENCE

AND

THE PRACTICE

IN

CRIMINAL CASES

BY JOEL PRENTISS BISHOP, LL. D.

SECOND EDITION
BY H. C. UNDERHILL

VOL. I

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PREFACE

It is the plan of my New Criminal Law Series that each volume shall cover its appropriated ground, not trenching on that of any other, be adequately indexed for separate use, and sold separately. To emphasize this, the present Volume I. is published in advance of Volume II. No considerate purchaser will object; for he buys a finished production, and if it were not such, still Volume II. has its established place in our legal literature, and should the improbable event of the death of both author and publisher occur before the new edition leaves the press, other people will be alive to complete it.

When the last copies printed from the plates of the third edition of this work had been sold, I refused to permit any more impressions to be taken, deeming that the profession was entitled to have the work in a new revision, and that I could prepare it in proper time. But sickness came and postponed the consummation, as the reader sees.

This volume is not simply an enlarged edition. It is a revolution in legal writing, whereof we have no precedent in any English-speaking country. The subject covers the part of the criminal law most used by practitioners, where therefore the cases are the most abundant. The last edition was a more than ordinarily compact production, with cited authorities specially numerous, arranged in the order of the reasons of the law, so requiring no change in the arrangement, whatever the extent of new adjudications. Into this volume I have injected new matter, causing the addition of more than twelve thousand new citations of cases, some whereof are necessarily repetitions which I

have not yet been able to count, leaving probably about ten thousand new cases, with all they imply. From the old I have omitted nothing of value; I have enlarged and made clearer the elucidations, have fully explained the reasons of every proposition of law not palpable on its face, and have put all in a form lucid to the comprehension of a child. And yet, not taking into the account the new Index of Subjects, the volume is increased in size by less pages than it required to print simply the names of the added cases. This is the result I aimed at by rewriting and condensing the language of an already condensed work, but it is a surprise to me that it has been so completely accomplished. There are in our legal literature but few volumes which cite in all as many cases as these new and added ones, yet not a useless case has been given, and I trust not many helpful ones have been omitted.

Between forty and fifty years ago, I abandoned legal practice for legal authorship, not because I did not like the practice or could not obtain a great deal more of it than I could do, or because in any other way I was in search of an occupation, but because I wished to make an impress for good on the law, and leave the world a gainer by my having lived in it. I will not argue that this was a worthy motive, or that I did not make a great mistake. I look back upon the brief period of my practice with an affection which I have for no other part of the past,—a belt of sunshine, beyond a foreground of uncertain hue. Whether my altered life is to prove beneficial or harmful is an enigma not yet solved.

Knowing that I must make my books salable, or the writing of them would be of no benefit, I have from the first bent them sufficiently to mistaken prejudice to make them acceptable to our best lawyers,—knowing that for them to be truly useful, not merely salable, they must state

the law as it really is, in distinction from erroneous holdings and inaccurate *dicta,*—knowing that they must lay down, and in form correct, the reasons of the law, or they would not be law books at all, but only bundles of collected conclusions, without service to the profession except as doing the work of a fag,—knowing that what the judges and practitioners failed to think of as clearing up difficulties, I must,—I have written my books as the intelligent members of the profession, who have studied them, know them to be.

In connection with this more solid work, I have done gradually, so as not to excite opposition to steps not of prime importance, what I could to improve the form of our legal treatises; and the improvements of this class have been widely followed by subsequent writers, with scarcely anything of active opposition. Thus, in my first publication, I set the example, now much copied, of placing the current section number, instead of the page number, at the top of each page, thereby facilitating reference. To secure this, I had a notable "fight" with the printers, who insisted it could not be done; but at last "victory perched on my colors." Down to a considerable time after I commenced these labors of authorship, it was universal, so far as I could learn, to print the smaller-type notes of a law book, standing at the bottom of a page, with the same space between the lines—in technical words, with "leads" of the same thickness—as the larger-type text, or else to set the notes "solid." In neither case did the page look well; and in the one, needless space was occupied by the notes, in the other they were not easy to the eye. My excellent printers did not "fight," but seconded at once my suggestion that the leads should diminish in thickness as the type did in dimensions. So they had leads cast specially for my books; but they used them also on other works, and the

example has been widely followed. Again, it occurred to me that it would facilitate the use of a legal treatise to have section and paragraph heads in a type not common, like *italics,* but readily distinguishable from all other on the page. The printers at once acceded to this view, and had a suitable type cast expressly for my use; and other authors and printers adopted this innovation, greatly to the benefit of their books, till now it has become common. And I have made various other accepted improvements.

Of deeper significance is another innovation, prominent in the present volume. At one time, when I knew that my books would be attacked because stating the law as it is, not pirated from less accurate predecessors, by persons who would pretend that their accuracy was inaccurate and their carefulness in the enunciation of doctrines was the result of carelessness or incapacity, I adopted, as a sort of earthwork for their defence, the employing of words which I knew to be superfluous, so as to forestall, as far as possible, misrepresentation. When this style had in a measure accomplished its object, I began to trim down my sentences and paragraphs to smaller dimensions. Continuing and gradually intensifying this process through various writings, I at last made condensation specially prominent in my enlarged work on "Contracts."

Gentlemen who felt sure they knew told me that in this way I should kill my books. Our profession, they were absolutely certain, were gaseous bipeds, who could be attracted only by a diet in large part of wind, and who had not grown out of the pap-eating period to crave solid food. I felt trustful that now at the close of the nineteenth century we have a considerable body of lawyers not of this sort, so persisted in rushing upon what the prophecy stated to be ruin. Hence my "Contracts" was issued in form so condensed that what would otherwise have required two or

three volumes was contained in one; saving money to the purchaser, and time to the user, and presenting all plainer to the comprehension and more exact in doctrine than if the windier form had been employed.

Well, thanks to an intelligent profession, not altogether perverted by an unthinking prejudice, my book survived the launching, and rode at once into a sale more rapid than was ever attained by any book on the subject. This was a consummation very unsatisfactory to the sore-headed "enemy." The book, like all other properly conducted condensations, was clearer to the understanding than the windy sort could be; just as the view through a pane of glass is improved in proportion as you remove from the glass all foreign substances. The "enemy" did not pretend that it could not be understood, since any lawyer who opened it would at once discern the contrary. But the falsehood was promulgated that the book was simply for learned judges, and law students could not comprehend it. Of course, every lawyer *knew* this assertion to be false on its face, for a law student has already his preliminary education, and has learned to know the meaning of language as well as the judge. And no one pretends that an admission to the bar is so transforming as to enable one who the day before could not understand an exposition which was to guide the courts might the day after so well comprehend it as to advise his client duly thereon and lead the court in its decision. Still, as in many another like case, there were lawyers who *believed* what thus they *knew to be false.* There are many who will sooner drink in an absurdity like this than look to see whether some preconception is not wrong. Again, there are persons interested in the profits of our over-voluminous literature, who mistakenly think that the very reasonable reduction of it to one quarter of its present bulk would take from them their wealth; so we have the

announcement that a certain book of the old sort on Contracts has and always had a greatly larger sale than any other on the subject, thus hopefully annihilating from the professional regard this compact form of writing. That the truth is quite otherwise seems no obstruction to such announcement, considering what may be deemed the immense pecuniary importance of crushing out this innovation.

There is no substantial reason for worry over this matter. Writers *who are capable of formulating the reasons of the law,* without which no text-book is even a law book, will not often, while present views prevail in the profession, feel called upon to bestow on their books the immense labor required for this sort of compression. And it would be simple folly to expect, and presumption to ask, our Supreme Judges, overworked as they are, to do this for their opinions. True, our reports of cases could be immensely improved, while not an idea now in them was left out, by reducing them to one quarter of the present bulk; but the public could not afford the resulting delay in business.

Still, for student-use, there is one truth perhaps in a measure accounting for the readiness with which some exceptional persons believed the falsehood what a condensed book which was to guide the learned judges could not be understood by the student. No one who as a learner intelligently reads the law goes swiftly through a text-book with no side reading or side-lights. In connection with such book, the wise student, who measures his progress by what he learns, not by the pages of the text-book passed through, keeps up a collateral reading of other expositions and of decided cases such as satisfy him at each step that he has mastered the law. With no one book, whether compact or diffuse, or however well written, can he be thus satisfied;

for each student has his own mental idiosyncrasies and wants, and only in this way can the full enlightenment be secured. Beyond which, a concise and accurate style calls for thought and pauses in the reading which a loosely constructed setting down of the law, the reading whereof is nearly or quite useless, does not. No one believes that a compact treatise can be mastered in as short a time as a loose one containing only a quarter of the former's legal doctrine. My own experience as a law student comes to my remembrance. Twenty-five pages, with the added collateral reading, constituted an average day's work upon the commentaries of Blackstone or of Kent; their equivalent of Story, whose comparative diffuseness is well known, was one hundred pages per day. Now, if there was ever a law professor so inconsiderate as to measure the lessons for his class by the pages of the text-book, then if he gave out as many pages of Bishop on Contracts as he would of a diffuse book, he would find the minds under his charge utterly bewildered by the four or half-dozen times the ordinary amount of study required of them. Truly the class would not make satisfactory progress; and if he did not see his own mistake, he would be as ready to believe that what was to guide the judges could not be understood by the student, as any other tramp falsehood.

I would not magnify the benefits expected from this condensation. We may assume that every writer has some special purpose in his writing. I certainly have and always had one, which overshadowed every other thing, and without which I never should have written a page. It is that by which I have hoped to make my books useful, and without which they would have no mission peculiar to themselves. It is the humble work, not generally deemed worthy of recognition, and seldom or never recognized in fact, of leading the profession to take practical cognizance of what

they know. Thus, as just said, every student capable of becoming a competent lawyer can understand any book which is to be the guide of the judges. There is no lawyer who does not know it. And yet there are lawyers who *believe* the contrary. I have always, in all my writings, kept up a continual course of pointing out that this or that thing was not thought of by a court or by counsel, the consequence whereof was an erroneous decision or misleading doctrine. In my recent "Marriage, Divorce, and Separation" I made a special feature of this sort of pointing out. This is not a matter peculiar to the law, it pervades our intellectual activities everywhere. Thus, every mechanical invention consists of practically thinking, in connection with the subject, of something which the inventor and every other informed person knew before. And a law treatise, written on the plan which I have endeavored to pursue, contains invention enough, if it were directed into the mechanical field, to give the writer patent rights which would make him a millionaire. And if our whole legal field were duly written over in this way, by persons competent therefor, our common-law jurisprudence would be a blessing to the world eclipsing every other like blessing ever known. But the difficulty is to lead our lawyers to understand this. Every one is proud in the consciousness that he does "my own thinking, sir." However important is a suggestion from a text-writer, no one doubts that he, without aid, would have thought of it, and more, and better. Some judges are of this sort; a faithful text-writer is sometimes required to point out that neither they nor counsel thought of this thing, or of that, and hence that their conclusion was wrong. This sort of judge can never be made to read and understand what it was that he overlooked, or acknowledged even to himself that he overlooked anything. And he believes in his very soul that the

text-writer, of whom he reads enough to know that he dissents from the conclusion, but not why, has done him a great wrong. I remember a judge of this sort, whom I greatly respected for many excellent qualities, but he did not deem it possible he could fail to see anything worthy of note; and his holy wrath and honest indignation toward a faithful text-writer whom he would not read, were something terrible.

Now, if by any cunning device, or by any other means, I could induce my professional brethren to practically apply what they know to the several questions before them, I should be a greater benefactor than any lawyer who ever lived. I have been working upon this problem for nearly fifty years, and have grown old therein, yet I cannot discover anything in this direction accomplished. When a young man, in a city where I was scarcely known, this method applied to practice gave me at once all the business I could do, so that when I left the practice I had more trouble to get rid of it than it had cost me to acquire it; yet, of course, it secured me among lawyers no more reputation than it has done in the writing of books. But it gave me money and an employment, and the satisfaction of real benefits conferred on clients. The writing has equally furnished an employment, yet greatly less money, and no fame.

One who writes for all the multiplying States of our Union, and for the help of the various courts of the United States, ought to cite cases in such numbers as would seem ridiculous to a lawyer in England, where a case from any tribunal is of equal authority in all. This is one of the reasons why I load my pages so heavily with cases. Yet I beg not to be misunderstood. There is now a fashion among some of *believing* cases to be what they *know* they are not. There are among us those who tell us that the

cases in our books are the *original sources* of the law, and evidently they believe it, while yet there is not anywhere a single lawyer who does not know otherwise. To state in full what are the original sources would require too much space in this Preface. But to say that the politician who by manipulating the voters and leaders of his party secures an election to the Supreme Bench of his State acquires thereby power to make an "original source" of the law, binding the people of all the other States and of every other nation where the common law prevails, is an absurdity too steep to be entertained by any lawyer. We all *know* this is not true. And if it were true, we all, who have read the cases in our books, know that such supposed original sources are contradictory to one another, and their antagonisms are so great as to destroy the whole. And still we have, not absolutely, but to a considerable extent, one law pervading our entire sisterhood of States. There are statutes, no one of which is of force beyond its own State, and there are decisions, each of which is in like manner territorially bounded; but over these, and in a measure modifying them, there is a common reason recognized by the courts everywhere. It is the reason, not the statute or the local decision, which constitutes the soul of the true legal treatise. The author of the treatise is helped by the decisions; while he is looking into the reasons they steady his argument, and they furnish illustrations of how the propositions of law are practically applied. But they do not bend his text out of reason. There are lawyers in plenty who believe that their Supreme Court can make the sun rise in the west and set in the east, can lift up mountains with no valleys between them, can make contradictions of legal doctrines and incompatible things stand together, and can overrule the law of nature precisely as they do the decrees of any inferior court. But whatever

we believe, we know that this is not so. Therefore one of the original sources of our law is the law of nature, another source is necessity; each of which furnishes a law not in the power of any judicial tribunal to overrule. And there are various other original sources not possible to be affected by any judicial decision.

The text-writer cites the cases, not because original sources, for they are not, but because they are helpful as evidences of the law. He does not often cite the law of nature, not because it is not superior to the cases, but because he has not before him the book and page. And it is the same of the other authorities of the sort which override the cases; he regards them, and yields to them, but he does not set them down in his foot-notes.

Again, every sailor *knows* that a rope can be cut in two. But we have all heard of one who *believed* it could not; so he could not use a rope too long, though if it were too short he could splice it. In like manner, we have educators in the law who *believe* it impossible to use a book too large, though they *know* that a student can be led to study a part of it and pass over the rest. Acting upon what we all know, not upon what a few of us believe, I never have been afraid of making a book too large for the student, but have felt that it would sometime fall into the hands of an instructor who would indicate how much and what of it should be studied by his particular charge. To illustrate: I could make a book which I should deem useful by abstracting from the present volume the parts which state the reasons of the law, with only leading illustrations, omitting the rest. Such a book would more nearly than this correspond to my volume on "Contracts." But this volume would equally serve the student who has not time to master the whole of it. He can himself look up and distinguish the parts which give the reasons, and look at as many as

he wishes of the illustrations, passing over the rest. He will thus be required to do a little work which if he were indolent he would prefer to have done for him, but he will derive to himself immensely more benefit. He must in some way acquire this sort of skill before he can become a successful practitioner. And the judicious instructor, whose pupils are to be powers in the profession, will see that they acquire the facility of doing everything which they must in practice. If I were to do everything which I am asked and advised to do, I should put every book into half a dozen ones, so as to suit the differing views of the various classes of readers,—some large, some small, some medium, and so on. Now, the size of a book is of much less consequence than its contents. If the doctrine is accurately and clearly stated, it will do a useful work whether large or small. The present volume is the best I could write for students, who, if they do not wish to master all of it, can have an excellent exercise in picking out what they want. And it serves just as useful a purpose as constituting a part of a full and minute exposition of the law of crime, as if it were valueless for student use. But more of this appears in my Preface to "New Criminal Law."

J. P. B.

CAMBRIDGE, MASS., February, 1895.

PREFACE TO SECOND EDITION.

In offering the Second Edition to the public the editor would say that the text of the prior edition is, except in a few instances, substantially unchanged. Several sections however, have been added where it seemed necessary to supply omissions. A large number of the most recent and best considered cases have been added, bringing the citations down to the date of going to press. In all cases parallel references have been made to the National Reporter System. Numerous illustrations and explanations, and, when necessary, statements showing modifications of the text, have been added to the notes, the effect of which has been to expand the book from two to three volumes. The general rules of practice and procedure are treated in Volumes I and II, while Volume III is devoted wholly to procedure and evidence in various common law crimes.

Dated January 10, 1913.

H. C. UNDERHILL.

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NOTE.—Where the plaintiff is the king or queen (Rex or Reg.), the State, Commonwealth, People, United States (abbreviated S., C., P., U. S.), or the like, the defendant's name is put first. The plaintiff's is first in the other cases. The figures denote the section; the letters (i, ii, and iii), the volume.

Cleveland, P. v. (49 Cal. 577) ii, 951a, 980a, 1170
—— v. S. (86 Ala. 1) ii, 975c, 980a, 1049; iii, 599
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NEW CRIMINAL PROCEDURE.

BOOK I.

PRELIMINARY OUTLINES.

CHAPTER I.

JUDICIAL PROCEDURE IN GENERAL.

§ 1. **The Law is divided**—into the rules which prescribe the conduct of the people, and those which regulate its own steps in enforcing obedience. The two branches are called sometimes substantive and adjective law; oftener, law and procedure. When speaking of juridical law, such as is here treated of, and limiting ourselves to the criminal department, we term the latter Criminal Procedure, which is the title of these volumes. Still,—

§ 2. 1. **Procedure divided.**—The term Procedure is too wide in meaning to be much employed in legal disquisitions. Consequently, it is divided into Pleading, Evidence, and Practice, and a writer ordinarily employs the appropriate one of these three more specific words. The wide general one denotes whatever the narrower three in combination do, and perhaps nothing more.[1]

2. **Pleading.**—in law-phrase, does not mean, as sometimes in popular speech, an advocate's address to the judge or jury, or the act of making it. But it is the science or course of allegation whereby a party in a cause presents

1. Kring v. Missouri, 107 U. S 221, 231, 232, 2 S. Ct. 692.

his demand or defence, to be made therein matter of record. And the word "pleadings," in the plural, signifies the allegations themselves, or sometimes "only those allegations or altercations which are subsequent to the count or declaration."[2]

3. **Evidence,**—in one of its familiar meanings, is oral or written testimony introduced into a cause. But as employed in the title of these volumes, it denotes those rules of law whereby to determine the weight and effect of testimony, and what to admit and what reject.[3]

4. **Practice**—is the law's order and steps to bring parties into court, and thereupon the course of the court in dealing with them.[3a] So that, as thus defined,—

§ 3. **The Three Terms,**—Pleading, Evidence, Practice, considerably overlie one another in meaning. Indeed, Practice, in its fullest import, includes most of what is comprehended by the three combined, though commonly we more restrict it. In these volumes, there will be no attempt to give precise bounds to any one of the words,—the chief aim being clearness of elucidation, and practical convenience.

§ 4. **Steps to Final Record.**—Returning to the word "procedure," as comprehending the combined meanings of the other three, let us suppose that a man deems another to owe him money which he refuses to pay. Having resolved to enforce payment, his course is to put the fact of the indebtedness on the record of the court, and then put in motion the power of the country to compel the delinquent to pay. This record is made and kept by the clerk under direction from the judge. But the judge should not and will not have it made until the facts are duly established before him. Therefore the applicant for the record, called the plaintiff, must notify the one complained of, termed the defendant, and give him opportunity to come and object. If he elects not to appear, he thereby admits the plaintiff's

2. Gould Pl. 13.

3. Kring v. Missouri, 107 U. S. 221, 2 S. Ct. 692.

3a. Ib.

claim, and the record is made up against him accordingly. If he comes and opposes, the parties severally state in writing what they claim to be the facts, and produce their testimony; whereupon the judge, with or without the aid of a jury, ascertains the truth, pronounces the conclusion of the law thereon, and causes the proper record to be entered.

§ 5. **Record Effectual.**—To give effect to the record,—

1. **Execution.**—The judge, by an order either specific or general, directs the clerk to issue a written command to the proper officer to enforce compliance with what the record requires. This command is known as an execution; but there are differing sorts of executions, bearing corresponding names, to meet the justice of differing cases. And—

2. **Force.**—In serving the execution, not only may the officer exert his personal strength, but, if occasion requires, he may also call out the whole civil and military power of the country.

§ 6. 1. **Law.**—While thus the law was the guide for the judge in determining the effect of the evidence, so equally was it as to the procedure. Still,—

2. **Discretion.**—In judicial procedure there are many things which in their nature cannot be subjected to exact rule; necessarily, therefore, they follow the discretion of the judge. But as far as possible he regulates the discretion by rule;[4] and rule and discretion often blend, in proportions varying with the differing cases, and with the differing views of courts. Again,—

§ 7. 1. **Usage.**—While much in the substantive law comes from usage, most of the procedure does,[5]—a proposition requiring more or less and differing qualifications in our several States, by reason of codes and other regulating modern statutes. And—

4. Post, §§ 72, 256, 425, 447, 454, 761, 766, 949b, 951, 966a, 1277; New Crim. Law, I, § 1041; 1 Bishop Mar. Women, § 676.

5. And see U. S. v. Stevenson, 1 Abb. U. S. 495.

2. **Necessity,**—a power which nothing can resist, to which the unwritten law, the statutes, and even our written constitutions alike yield, creating exceptions to what is in terms without exception,[6] operates widely in the department of procedure.[7] For example, what necessity says must lie in the judicial discretion, not being reducible to rule,[8] cannot be treated as of strict law. And there is a *quasi* necessity, of wide effect, yet less absolute. Moreover,—

3. **Convenience**—has its effect. Falling short even of the *quasi* necessity, its presence is always felt, and not unfrequently it controls the form and course of the proceeding. Also,—

§ 8. **Statutory Regulations,**—which should not be lost sight of, more or less modify those of the common law. While some repeal it, most do not; so that generally the common law or statutory form may be adopted at the election of him who takes the particular step.[9] And where this choice is not permitted, still the practitioner should know what the common law rule is, as an aid to the interpretation of the statutes,[10] and for other reasons.

§ 9. **Rules of Court.**—From the foregoing views it follows that in the absence of statutory direction, the collective judges of every judicial tribunal may to a considerable extent regulate its practice by general rules, reduced to writing. This power has been acknowledged in all ages of the common law. Yet the limits of it are not precisely defined. Each individual judge is bound by the rules thus lawfully established, the same as by an act of the legislature; that is, he cannot in a particular case substitute his discretion for the rule. To the like extent are the collective judges bound while the rule stands, though they can alter or abolish it at pleasure. And both in England and in this country statutes have conferred on the judges more or less power of predeter-

6. New Crim. Law, I, §§ 54, 346-355, 824 (3).

7. Post, § 493 et seq.

8. 1 Bishop Mar. Women, § 676.

9. Dir. & F., §§ 23, 541; Stat. Crimes, §§ 163d-164, 169, 250a.

10. Stat. Crimes, § 6.

mining the practice of their tribunals by these general rules.[11] Therefore,—

§ 10. Combined Discretion and Rule.—As governing the procedure, we have at the two extremes the immutable rule and the plastic discretion of the judge presiding. Between these extremes, lie constantly varying mixtures of rule and discretion, each differing in proportions from all the rest. And neither our books of practice nor the adjudications inform us with exactness, or much in detail, what are the things at the extremes, and what and how proportioned are those between. Yet the practitioner is less embarrassed than on this statement he would seem to be; because his good sense, his general understanding of the law as he has read it, and the results of his observations in the daily routine of his duties, will ordinarily point out to him the course, in the absence of other and specific direction.

§ 11. Other Terms of Art.—Besides Pleading, Evidence, Practice, we have such terms of art as Plea, Count, Declaration, Indictment, Demurrer, Oyer, Surplusage, Presumption, and numerous others. Those which pertain to the topics of these volumes will be explained as we reach them in their proper places.

11. And see Thompson v. Hatch, 3 Pick. 512; Rathbone v. Rathbone, 4 Pick. 89; Hanson v. McCue, 43 Cal. 178; Cochran v. Loring, 17 Ohio, 409; In re Moore, 108 N. Y. 280, 15 N. E. 369; 1 Bishop Mar. Div. & S., §§ 140-146, where the subject is more fully discussed.

CHAPTER II.

CRIMINAL PROCEDURE VIEWED HISTORICALLY AND IN GENERAL.

§ 12. **Unstable.**—Since judicial procedure is more within the discretion of the particular judge or tribunal than the substantive law, it is necessarily more fluctuating and uncertain. Especially is this so in the now to be considered—

§ 13. **Criminal Cases.**—The idea is common, yet quite mistaken, that our criminal procedure changes less than the civil. True, the forms of the indictment practically remain much as they were a century ago,[12] even in States where the pleader has the option of statutory ones assumed to be more simple.[13] But in the practice of the courts, not speaking of the rules of evidence, almost all in criminal causes is more or less afloat.

§ 14. **Why?**—the reason is partly historical. Thus,—

1. **Counsel—Copy of Indictment.**—Anciently the English tribunals refused to men indicted for treason or felony what is now regarded as an essential right; namely, the assistance of counsel at their trials before the petit juries in matters of fact,—a rule which did not extend to misdemeanors.[14] Counsel were sometimes permitted to argue to the court special questions of law deemed difficult, but this was all. Not even were they or the prisoner ordinarily suffered to have a copy of the indictment; they might simply hear it read. And it is not unreasonable that the decisions of judges who could establish rules so contrary to natural justice, should not in other respects be accepted in more enlightened periods as absolutely binding.

2. **Judges as Counsels.**—They deemed themselves to be of counsel for the accused,[15]—an idea which justly finds

12. See, however, post, § 24.

13. Not always really simpler, or shorter, or better. See Pref. to Dir. & F.

14. Post, §§ 296-298.

15. Post, § 120.

some recognition also in the modern law. Anciently they carried out this idea by sometimes browbeating him and his jury, by denying him what was plainly necessary for his defence, and by wringing from well-meaning men of the panel an unjust conviction; and sometimes by letting him off on a technicality which their microscopic eyes discovered, having nothing to do with justice or the real merits of the case. An instance in which the two sorts blended is—

§ 15. **Rosewell's Case.**—A Presbyterian preacher having been indicted for an alleged high treason in a sermon, the judge permitted the impanelling of the trial jury to be hurried in a way to confuse him in his challenges, scolded him, refused to let him correct a mistake made in his embarrassment, and so dashed along to the verdict of guilty which the bench was plainly seeking. Thus,—

§ 16. **Examination of Witnesses.**—One of the witnesses against the defendant was a female treason-hunter, who by false pretences had gained admission to the conventicle to hear the sermon. When she had delivered her testimony, he sought in the cross-examination to show the connection in which the words she swore to were used, as rendering them innocent. "I suppose there may be some coherence in my discourse. I would know how they were brought in." But the judge, claiming to be the prisoner's counsel, and denying him all other counsel, interrupted, and refused to let him put any question of this sort. "Why, man, there can be no occasion for speaking of those words. You spoke them without any occasion at all. . . . Do you ask me what reason any man has to speak treason? I tell you there is none at all to be given for it. . . . Do you ask what reason you spoke treason for? I tell you, no reason can be given for it."[16] Of course, the court succeeded in getting its *client* convicted, though he brought forward ample testimony to his innocence. But—

§ 17. **Flaw in Indictment!—Counsel now!**—When Rosewell was called up to receive the sentence of death, he told

16. Rosewell's Case, 10 How. St. Tr. 147 et seq.

the court, in response to the question why it should not be rendered, that there was a flaw in the indictment! Assuming the words it set out to be sufficient in law, still they were not introduced in due form of legal etiquette to their place on the judgment seat! In vain the Attorney-General and the Solicitor-General objected to the objection. They said it was "only in delay." "Mr. Attorney," responded the Lord Chief-Justice, "*De vita hominis nulla est cunctatio longa.* I think we ought to assign him counsel, and the rest of my brothers are of that opinion too." Thereupon,—

§ 18. **Copy of Indictment.**—The counsel assigned to argue this law question applied to the court for a copy of the indictment; or, at least, fôr so much of it as would show them what they were to argue about. Yet they were refused, because such had not been the practice. The Lord Chief-Justice admitted it to be "a hard case that a man should have counsel to defend himself for a twopenny trespass, and his witnesses examined upon oath; but if he steal, commit murder or felony, nay, high treason, where life, estate, honor and all are concerned he shall neither have counsel nor his witnesses examined upon oath. But," he added, "I tell you I am loath to be the author of precedents in cases of this nature, one way or other."

§ 19. **Indictment Bad—Pardon.**—So the counsel made their argument as best they could without the copy; and the judges deemed the indictment to be wanting in proper introductory averments, though what was meant was plain to common apprehension, and the treasonable words were, and purported to be, exactly given. Therefore they recommended to the Crown a pardon, which in due form the convicted preacher brought into court, pleaded, and received his discharge. Being a scholar, he objected to the Latin of the indictment; but the Latin of the pardon passed well with him. Thus, contrary to just rule he was condemned to die, and contrary to just rule he was saved from death.[17]

§ 20. 1. **The Presiding Judge**—at this trial was Jeffreys,—a name now held in universal execration.[18] But it

17. Rosewell's Case, 10 How. St. Tr. 147, 155, 165, 166, 260, 267, 268.

18. There are two classes of men of the past concerning whom we

would be difficult to point out that his course in this case differed from the common practice in his age. The date is 1684. Passing down to the presumably more enlightened period of 1710,—

2. **Sacheverell's Case.**—We find the whole House of Commons moving before the Lords an impeachment of Henry Sacheverell, D. D., a clergyman of the Established Church, for the misdemeanor of publishing two sermons offensive to one of the political parties. The principal complaint was of insinuating that the Church of England was in danger; whereas, four years before, the whole Parliament had solemnly voted her out of danger, and on address the queen had issued a proclamation declaring such to be her condition. The charge being misdemeanor, not treason or felony, he was permitted counsel in his defence, but was convicted. Thereupon he moved in arrest of judgment on the ground that the impeachment gave neither the criminal words nor their substance, but only said he insinuated, and the like. The Lords asked the reverend judges, "Whether by the law of England and constant practice in all prosecutions by indictment or information for crimes and mis-

can learn nothing certain. The one class are those who were special favorites in their day; the other, those who are now specially detested. Woolrych, in his Life of Jeffreys, p. 145, gives the following reason for the course pursued upon this motion in arrest of judgment: "Rosewell made a very admirable defense; and, happily for him, there was present a baronet, Sir John Talbot, who though not friendly to dissenters highly appreciated what he had said, and thought the verdict wrong. From the trial he posted away to the king, and declared that he had seen the life of a person, who appeared to be a gentleman and a scholar, in danger upon such evidence as he would not hang his dog on; and, 'Sir,' says he, 'if your Majesty suffers this man to die, we are noné of us safe in our houses.' This address had a full influence upon the royal ear; and whilst it was operating in came Jeffreys, overjoyed and vaunting of the signal service which he and the Surrey jury had done; when to his utter confusion the monarch replied, under a strong feeling of sympathy, that the prisoner must not die, and that he, Jeffreys, must find out some way to bring him off." This statement may, for aught I know, be true. Lord Campbell, in his Lives of the Chancellors (for Jeffreys was afterward Lord Chancellor), says Jeffreys was anxious for the acquittal of Rosewell!

demeanors by writing or speaking, the particular words supposed to be criminal must not be expressly specified in such indictment or information?" The judges answered, with one voice, that they must. Thereupon, "It is resolved by the Lords spiritual and temporal in Parliament assembled, that by the law and usage of Parliament, in prosecutions by impeachments for high crimes and misdemeanors by writing or speaking, the particular words supposed to be criminal are not necessary to be expressly specified in such impeachments."[19] So that—

§ 21. **Result—Observations.**—With no charge specific enough to permit a defence, Sacheverell was punished. Yet Rosewell, against whom the allegation was definite and full, had been permitted to escape on a quirk. And thus popular wrath, in the whole House of Commons, pursuing its victim into the House of Lords, proved to be more intolerable than judicial wrath had been, even at an earlier period, in the persons of Jeffreys and his associates,—a fact admonishing us to beware how we take down the barriers which the common law erected, during the struggles of liberty with despotism, between the accusation and sentence. As in peace we should prepare for war, so while liberty is in repose we should make ready for the day of her conflict.

§ 22. **Adhering to Precedent.**—The reader has noted with what tenacity Jeffreys, in Rosewell's Case, adhered to the established practice, and how fearful he was of departing from it. This type of mind is not uncommon, even among judges of eminent learning and humanity, down to the present day. What is the true doctrine on this subject we saw in another connection.[20] Yet plainly, with us, no tribunal would now follow the precedents to which Jeffreys clung, as to counsel and a copy of the indictment, even had not subsequent legislation ordained, as it has, otherwise. Still the judges differ in the intensity of their reverence for forms and for justice. The conflicts on this sort of question have been great, and the results various. Hence it is that

19. Sacheverell's Case, 15 How. St. Tr. 1, 37, 466, 467, 471, 473.

20. New Crim. Law, I, §§ 93-98

the practice of our day is less settled in criminal causes than in civil.[21]

§ 23. 1. **Effect of Unjust Precedent.**—When the procedure has seemed very oppressive, merciful judges, to mitigate it, have listened more attentively than otherwise they would to technical objections by the accused. And in consequence,—

2. **Subtle Pleading.**—Some rules have grown up, particularly of pleading, and as respects the indictment, too subtle to accord with the more enlightened judgment of the present day. Yet they are less in number and absurdity than is commonly supposed. Such of them as are without just reason are in many of our courts discarded judicially,[22] and in most States they are largely legislated away; so that now little remains to condemn beyond a too close adherence to old technical words and forms of expression. Indeed, the present tendency is rather toward too loose a practice, and allegations too indefinite. For though the unthinking multitude—crying to-day for this reform and tomorrow for that, pursuing with hot blood one class of offenders to-day, another tomorrow—would almost remove the obstruction of a trial between the offence and the punishment, the wise see that what may render slow the steps of real justice is the protection of innocence in its hour of peril and anguish. In the words of Blackstone,—

3. **Uses of Delays and Forms.**—"Delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters."[23] "If it be said," to quote from a learned American judge, "that by the result of this opinion the defendant may escape from the charge of a serious offence, of which if guilty he is justly obnoxious to a heavy punishment, the answer is that the safety of the community consists in a steadfast adherence to rule and principle, especially in criminal cases, even if at times a guilty individual should thereby escape."[24]

21. Ante, § 13.
22. Wallace v. S. 2 Lea, 29.
23. 4 Bl. Com. 35(
24. Ewing, C. J. in S. v. Jones, 6 Halst. (N. J. L.) 289, 291.

§ 24. **Discarding Technicalities.**—Some strong expressions have been made by American judges, to the effect that we, of this country, disregard the technicalities of the English common law in our criminal pleadings.[25] But observation establishes that, except as statutes have modified the rules, our courts do, in them as in most other things, follow the common law of England.

§ 25. **Common Law too Loose.**—There are, even in the English common law of criminal pleading, rules not sufficiently favorable to defendants. Such defects demand legislative amendment, perhaps also judicial, as much as a too great nicety, or a too close adherence to technicalities. It is now the fashion to say much concerning the one sort of defect, nothing of the other. Let us be just, not casting down without also building up.

§ 26. **Prosecuting Officer.**—In all our State and national tribunals, criminal prosecutions are carried on by an officer chosen for the purpose.[26] He has great power: he can ordinarily prevent the grand jury from finding an indictment; for he is their adviser, and he draws it. And after it is found he can refuse to prosecute it. He should, therefore, possess that element of a great lawyer, integrity, in the highest degree. In mental habit he should be exact, and his legal learning should be the amplest. One thus endowed need never permit an offender to escape from a defect in the indictment, though the judges hold him strictly to the old rules. And if the people confer the office on an aspirant whose sole qualification is that he can bawl loud and long at the caucus, they ought not to complain when criminals escape through his blunders or slothfulness. That is no just ground for removing by statute any bar which liberty has put up to protect her children.

§ 27. **The Law of Evidence**—is in a measure necessarily fluctuating. And in a few things therein strict rules yield to the discretion of the presiding judge.

12. See Harriman v. S., 2 Greene (Iowa), 270, 279; McKinney v. P. (Ill.), 2 Gilman, 540, 43 Am. D. 65. And see ante, §§ 13, 23.

26. Post, § 278 et seq.

CHAPTER III.

A CRIMINAL CAUSE IN OUTLINE.

§ 28. **This Chapter**—will briefly bring to view the several steps in a criminal cause, in their order, remitting the details to chapters further on; as when, in exploring an unknown city, we first look down upon it from a height, then descend to the streets. And by thus fixing in our thoughts, at the beginning, the sequence of the steps, we shall avoid the necessity of following it in subsequent unfoldings, should another order be at any place more convenient or perspicuous.

§ 28 a. **The Choice of Steps,**—and when permissible, will be considered in connection with the steps themselves. Not always is the choice important; but sometimes it is that from which practically results the success or failure of the whole proceeding, and in other instances the difference in convenience is considerable.

§ 29. **How Chapter divided.**—We shall consider, I. What precedes the Indictment, Complaint, or Information; II. What follows, down to the Finding upon the Facts; III. From the Finding of Guilty to the Execution of the Sentence.

I. *What precedes the Indictment, Complaint, or Information.*

§ 30. **The Arrest:**[27]—

1. **Necessary.**—To corporally punish an offender, possession must be obtained of his person. Hence,—

27. Post, §§ 155-224b.

2. **First Step.**—In general, when a crime has been committed, the first step against the doer is to arrest him.

3. **A Warrant**—will in some circumstances be required, in others not.[28] Practically the better course is to procure it though not necessary, if convenient, and if it does not increase the danger of escape.

§ 31. 1. **By whom issued.**—A magistrate with jurisdiction to try the offender, or bind him over to the grand jury, may, on complaint against him while at large, issue a warrant for his arrest.[29] Or,—

2. **After Indictment.**—In most of the States, the arrest may be postponed until the grand jury has indicted him, and then it will be made on a bench warrant from the court.[30]

3. **Choosing.**—Generally the power which prosecutes will elect the former course. It secures at once the person of the accused; it expedites business by giving the notice which may prevent a successful application for delay after indictment;[31] and it secures the attendance of the witnesses.[32] Indeed, there are so many reasons for this course that in some of the States it is made necessary by statutes. Still, where statutes do not forbid, there are circumstances in which it is obviously better to save the trouble and expense of a preliminary warrant and arrest, and go at once to the grand jury.[33]

§ 32. **Hearing before Magistrate:**[34]—

1. **Necessary, when.**—If the arrest precedes the indictment, whether made on a warrant or not, the arrested person must at a proper time be taken before a magistrate or court competent to inquire into the case.[35]

2. **Keeping Prisoner.**—While he is in custody, and not before the magistrate or court, the officer need not maintain a manual possession of him, but may put him in the proper

28. Post, §§ 164-193.

29. Post, §§ 177, 179. And see the chapter beginning post, § 224c.

30. Post, §§ 263a, 869a.

31. Post, § 951a.

32. Post, §§ 34, 234b.

33. Post, § 239a.

34. Post, §§ 225 et seq., 716 et seq.

35. Post, §§ 213, 214, 216, 217.

place of confinement, either with or without a mittimus as the case requires.[36]

3. **What Magistrate do.**—The magistrate, aided by witnesses, will inquire into the facts.[37] If no offense is shown or only a petty one within his jurisdiction finally to dispose of, the case will go no further; unless the defendant, being convicted, takes it further by appeal.[38] If an offense triable only by a higher court is disclosed, the offender, should it be bailable, is ordered to recognize with sureties for his appearance before such court; and if he fails to furnish the sureties he is committed to jail. Likewise he is thus committed where the offense, being of great enormity, is not bailable.[39]

§ 33. 1. **Who instigate Proceedings.**—Generally, in this country, these preliminary steps are in practice taken at the instigation of some police officer, or constable, or private person, and not by the State's attorney; though the law permits their being had under the supervision of such attorney, and sometimes they are.[40] And—

2. **Circumspection by Magistrate.**—Where, as in many instances, there is a choice of accusation,—that is, where the prisoner may fairly be accused of one crime or another, or of more crimes than one growing out of the transaction, —it is plainly the duty of the magistrate to see that the commitment is broad enough to cover all—leaving it to the grand jury or prosecuting officer to elect between the methods.[41] Still, if the commitment is on narrower ground, the prisoner is not therefore to go clear of the rest.[42]

§ 34. **The Witnesses.**—The committing magistrate, having the witnesses for the prosecution before him, will take their recognizances to appear in the upper court. Sometimes the purposes of justice require the recognizances to

36. Ib.; post, §§ 225, 234a, 235.

37. Post, § 234b.

38. Post, §§ 235, 723, 1264.

39. Post, §§ 234b, 251, 255-257, 261.

40. Post, §§ 230, 232, 278, 285, 287, 719, 964.

41. New Crim. Law, I, §§ 599, 773-785a.

42. Post, § 239a; New Crim. Law, I, § 1014.

be with sureties; whence, now and then, a witness unable to get them is unfortunately detained in prison.[43]

II. *What follows, down to the Finding upon the Facts.*

§ 35. 1. **Court—Its Parts — (Officers — Petit Jury — Grand Jury).**—The cases not finally disposed of by the examining magistrate are taken, it is thus seen, before the proper *court.*[44] Now, for some purposes, the judge, sitting in the transaction of judicial business, is the court. Still, he acts therein, not alone personally, but also through his officers; such as the clerk,[45] the sheriff and deputies,[46] the attorneys at law,[47] the grand jury,[48] the petit jury,[49] and the like. And for various purposes all these together are the court. The case of a suspected person before a *court* is, in most of our States, first examined, not by the judge, or by the judge and petit jury sitting publicly, but by the grand jury in private.[50] Yet—

2. **Instructing Grand Jury.**—Sometimes the judge, knowing that a particular class of crimes, or some particular crime, is to be investigated by the grand jury, first instructs them in open court as to the law and their duty relating thereto. Indeed, it is the general practice, on the coming in of the grand jury to enter upon a term of service, to give them instructions, descending more or less into detail, concerning their duty. And a prisoner has various rights, such as to challenge the grand jury, or an individual juror, and the like, to be considered in chapters further on.[51]

§ 36. **Indictment or Information.**—When, as ordinarily in most of our States, the first step in court is to be taken by the grand jury, this body *presents* to the tribunal a

43. Post, § 234b.

44. Post, § 314 et seq.

45. Stat. Crimes, § 271a; New Crim. Law, II, §§ 255, 1020, 1021; post, §§ 960, 1342, 1344.

46. New Crim. Law, I, §§ 218, II, §§ 255, 349, 654, 978; post, §§ 181, 251, II, § 828; Stat. Crimes, § 88.

47. New Crim. Law, I, § 895, II, §§ 255, 270.

48. Post, § 849 et seq.

49. Post, § 895 et seq.

50. Post, §§ 857, 861 et seq.

51. Post, § 871 et seq.

written accusation of his crime; which presentment, on being returned before the judge and made of record, is called an indictment.[52] But in some of the States the greater part of the criminal causes are disposed of without a grand jury; when, instead of the indictment, the prosecuting officer makes an accusation in writing and lays it before the court, under the name of an information.[53] When also the accusation is by indictment, it is usually in practice drawn by this officer.[54] Such is the general course; but there are exceptional variations, to be explained in their proper places.

§ 37. **Arraignment.**—On the finding and return into court of the indictment, the prisoner is arrested if not already in custody.[55] It is then read over to him in open court, and he is required to plead to it. This is called the arraignment.[56] Thereupon,—

§ 38. 1. **Steps by Defendant—Election.**—The defendant, on his side, will take the steps indicated by the particular case. As to which he may have a wide election. Thus,—

2. **Dilatory Plea.**—One of the dilatory pleas may be available.[57] Yet, if so, resort to it will not always be judicious; as, if he is indicted by a wrong name, his plea in abatement must disclose the true one.[58] Then, should he succeed with it, he will doubtless be indicted over again, increasing his expense, and losing what in some circumstances will be valuable time. Or, if the grand jury remains in session, the prosecuting officer, instead of dallying with this plea, whether he deems it well or ill taken, will prepare a fresh draft of the indictment, wherein the name thus claimed by the defendant will take the place of the other; and, with no fresh evidence except the plea, they will find it a true bill, to be substituted for the former one. Or the grand jury may be in court at the arraignment;

52. Post, §§ 131, 136, 869a.
53. Post, §§ 141-147.
54. Ante, § 26; post, §§ 278, 696, 863.
55. Post, § 869a.
56. Post, § 728 et seq.
57. Post, § 734 et seq.
58. Post, §§ 328, 792, 793; Dir. & F., § 1037.

when, if a prisoner tenders a plea in abatement to the name, or asks time to prepare one, the correction can at once be made, with their consent, on the original bill, and this will end the objection.[59] And statutes have in some of the States provided still easier methods. But leaving them aside, when the grand jury has been dismissed, after their full term of service is ended, and there can be no fresh indictment except by another grand jury, something may be gained by causing the former to be abated. Perhaps a second grand jury will refuse a bill. Or, on the other hand, they may find one which will not be so easily answered as this, or which will subject the prisoner to a heavier punishment. If delay is caused, it may work for the prisoner's good or injury. Many considerations, not necessary here to be enumerated, will influence the discretion of the judicious practitioner in cases of this sort. Again,—

§ 39. **Indictment defective.**—If, on examining the indictment, the defendant finds it to be defective in its main allegations, he will have a choice of steps. He may move to quash it.[60] He may demur.[61] He may do neither, but where no statute in his State has altered the common-law practice, avail himself of the objection, if convicted, on motion in arrest of judgment.[62] Generally, not always, he will choose the method last named; or, he may even withhold the objection until after final sentence, and then bring a writ of error.[63] Yet in some of the States statutes require this objection to be presented at an early stage or not at all.[64]

§ 40. **The Trial.**[65]—When the cause comes before the petit jury, it may be a question how, out of several methods permissible, the prosecution or defense shall be conducted. The prosecuting officer, if faithful, will on his side select

59. Post, § 870.
60. Post, § 758 et seq.
61. Post, § 775 et seq.
62. Post, § 1282 et seq.
63. New Crim. Law, I, §§ 930-932, 1022-1026; post, § 1361 et seq.; Dir. & F., § 1083 et seq.
64. Dir. & F., § 38.
S. v. Pritchett, 219 Mo. 696, 119 S. W. 386; Palmer v. S., 121 Tenn. 465, 118 S. W. 1022.
65. Post, §§ 890-1045.

the method he deems best calculated to bring out the real facts, whether they lead to conviction or acquittal.[66] It is even more to the detriment of the State, whose interests he represents, that an innocent man should be convicted than that a guilty one should escape. But on the side of the defendant, the considerations are different. A lawyer may justly strive to procure an acquittal, whether his client is in fact guilty or not; because a guilty man is entitled to be convicted according to law, or in default thereof to be acquitted. Hence it is not wrong for his counsel to choose, out of various methods of defense, the one which will prove effectual.[67] And there is often a wide range for selection.

III. *From the Finding of Guilty to the Execution of the Sentence.*

§ 41. **Setting aside Verdict.**—A verdict of guilty is not necessarily to stand.[68] And if it can be overturned,—as, on a motion for a new trial,[69] or on exceptions[70] to a higher court,—the defendant's counsel should ordinarily do it. Yet sometimes it will be better to forego even this seeming victory. If, for example, the verdict or indictment is in a form to subject the prisoner to a sentence for only a small part of his real crime, or for a part only of what was meant to be charged, his interest may be best served by accepting it. And there are various other circumstances bringing a case within this principle.

§ 42. **Arresting Judgment.**—At any time before sentence, the defendant may under the common-law practice move to arrest the judgment for any defect in the indictment or other part of the record.[71] Yet, if he prevails, he has abandoned his right to rely on his conviction as a protection from a fresh prosecution.[72] So that in a particular case it may be prudent to forbear even this step.[73]

66. Post, §§ 293, 294, 975a.
67. Post, §§ 309-313; Dir. & F., §§ 37-41; New Crim. Law, I, § 376 (4) note, par. 12.
68. Post, § 1263 et seq.
69. Post, §§ 1268, 1272 et seq.
70. Post, §§ 1265, 1269, 1272 et seq.
71. Post, § 1282 et seq.
72. New Crim. Law, I, § 998 (5), 1000.
73. Ante, §§ 38, 39, 41,III, § 587, note.

§ 43. 1. **Sentence.**—When the time arrives for the sentence,[74] if, as at the common law, the court fixes the punishment, the prisoner's counsel should carefully inquire whether or not to bring forward anything in its mitigation, and the State's attorney whether to produce facts in aggravation.[75] And—

2. **Writ of Error.**—If the sentence is erroneous, or if any other error is apparent on the record, a writ of error[76] may become necessary. But this step is ordinarily a waiver of the bar of the conviction as a protection against a second prosecution,[77]—not in every case, therefore, judicious.

§ 44. **Conclusion.**—The details will appear as we proceed; all showing that he who would conduct well a prosecution or defense must first become familiar with the entire science and practice of the criminal law.[78] A stuffing for each occasion is not enough.

74. Post, § 1289 et seq.

75. New Crim. Law, I, §§ 948-950.

76. Post, § 1361 et seq.; Dir. & F., § 1083 et seq.

77. New Crim. Law, I, §§ 975 (2), 998, 1026.

78. Dir. & F., §§ 37, 40, 313.

BOOK II.

SOME LEADING PRINCIPLES OF THE PROCEDURE.

CHAPTER IV.

THE COUNTY OR DISTRICT OF THE PROSECUTION.

Consult—for the boundaries of countries, for the respective jurisdictions of the States and United States, and for what a particular government may punish as an offence against itself. New Crim. Law, I, §§ 99-203. As to change of venue; post, §§ 67a-76. How allege and prove the place of the crime, post, §§ 360-385, 407-414; Dir. & F., §§ 80, 84, 89, 90.

§ 45. **This Book**—brings to view various doctrines which dominate the entire law of criminal procedure, of a sort to be best considered separately, and as introductory to the rest.

§ 46. **This Chapter**—assumes the courts of the particular sovereignty to have jurisdiction, within prior explanations,[79] and shows in what local division of its territory the proceeding is to be instituted.

§ 47. 1. **The Doctrine of the Chapter**—is, that the prosecution must be in the county wherein the offence was committed; yet with some qualifications and exceptions, to be explained as we proceed.

2. **Whence.**—The rule of the county comes from the common law. Still it is competent for the governing power of any country to determine where an offender shall be prosecuted.[80] And we we have some constitutional and statutory provisions on the subject.

79. New Crim. Law, I. §§ 99-203.

80. S. v. Gordon, 60 Mo. 383; Dodge v. P., 4 Neb. 220; Lewis's Appeal, 67 Pa. 153; Gut v. S., 9 Wall. (U. S.) 35.

§ 48. **How Chapter divided.**—We shall inquire as to, I. Crimes against the States; II. Crimes against the United States.

I. *As to Crimes Against the States.*

§ 49. 1. **County where committed.**—By the common law, crimes are local, to be prosecuted in the county of their commission.[81] In no other can the grand jury inquire of them.[82] Even,—

2. **County divided.**—After a county is divided, a prior offence is to be prosecuted in the particular new county within which the criminal act was done.[83]

81. Coon v. S., 13 Sm. & M. 246; Sullivant v. S., 3 Eng. 400; Harker v. S., 8 Blackf. 540; Rex v. Spiller, Style, 108, 3 Salk. 77; Rex v. Jones, 6 Car. & P. 137; Bouche's Case, Cro. Eliz. 200; P. v. Honeyman, 3 Denio, 121; S. v. Nixon, 18 Vt. 70, 46 Am. D. 135; S. v. Godfrey, 3 Fairf. 361; S. v. Patterson, 1 Murph. 443; C. v. Call, 21 Pick. 509, 32 Am. D. 284; Rex v. Hicks, 12 Mod. 30, 31; Dowdale's Case, 6 Co. 46b; Barns v. Hughs, 1 Lev. 249; C. v. Kunzmann, 41 Pa. 429; Swart v. Kimball, 43 Mich. 443; P. v. Scott, 74 Cal. 94, 15 P. 384; Ham v. S., 7 Ga. App. 57, 66 S. E. 22; S. v. McNally, 23 Utah, 277, 64 P. 765; S. v. Morrey, 23 Utah, 273, 64 P. 764; Shaw v. P., 3 Hun (N. Y.) 272; P. v. Campbell, 4 Park Cr. 386; Hager v. Falk, 82 Wis. 644, 52 N. W. 432.

82. 4 Bl. Com. 303; 1 Stark. Crim. Pl., (2d Ed.), 1; Hughes v. S., 35 Ala. 351; Dempsey v. S., 94 Ga. 766, 22 S. E. 57; S. v. Knapp, 40 Kan. 148, 19 P. 728; S. v. Potter, 16 Kan. 80; S. v. Crinklaw, 40 Neb. 759, 59 N. W. 370; P. v. Stokes, 103 Cal. 193, 37 P. 207, 42 Am. St. 102; P. v. McGuire, 32 Cal. 140; S. v. Bunker, 38 Kan. 737, 17 P. 651; Macklin v. Com., 93 Ky. 294, 19 S. W. 931, 14 Ky. L. 180.

83. Stat. Crimes, §§ 144, 175; Hernandez v. S., 19 Tex. Ap. 408; S. v. Strathmann, 4 Mo. Ap. 583; S. v. Kring, 74 Mo. 612; Weller v. S., 16 Tex. Ap. 200; S. v. Jones, 9 N. J. L. 357, 17 Am. D. 483, 4 Halst. 357, 372, 17 Am. D. 483; S. v. Jackson, 39 Me. 291; Murrah v. S., 51 Missis. 675; S. v. Donaldson, 3 Heisk. 48. And see Ex parte Hall, 47 Ala. 675; Hall v. S., 51 Ala. 9.

Form of Allegation. If the place of the offence is in the county bearing a new name, it is believed that the more judicious form of the allegation is, on, etc. [Dir. & F., § 80], at, etc., then in the county of X, in a part thereof which is now in the county of Y. Yet an indictment was sustained which simply laid the offence in the new county. McElroy v. S., 13 Ark. 708. On the other hand, this was adjudged insufficient, the court observing: "It is seen that, at the time mentioned, there was no such place as that at which the offence is alleged to have been committed." S. v. Jones, su-

§ 50. 1. **Constitutional Restraint,**—in some of the States, preclude or limit legislative change of the common-law rule. The words in Massachusetts are, "In criminal prosecutions, the verification of facts in the vicinity where they happen is one of the greatest securities of the life, liberty, and property of the citizen."[84] In some of the other States the provision is direct, that the trial shall be in the "county," or "county or district," where the offence was committed.[85] Of equivalent effect, some hold, is the con-

pra. It has been held good to say, "in that portion of the county of Baker which is now the county of Dougherty." Jordan v. S., 22 Ga. 545, 555. An Arkansas statute having declared those living on the east fork of Illinois Bayou, in Van Buren county, to be citizens of the county of Pope, with the rights and privileges thereof, it was held not to work a transfer of territory; so that, where an offence was charged as committed in Pope county, proof of its commission on the east fork of Illinois Bayou, in Van Buren county, would not sustain the allegation. Holmes v. S., 20 Ark. 168. And see S. v. Stokely, 16 Minn. 282; S. v. Fish, 4 Ire. 219; post, § 381.

Some special changes. After Maine was created a state by separation from Massachusetts, an indictment in Maine for a prior offence was required to charge it to have been committed against the peace of Massachusetts. Said the court: "Whoever commits an offence, indictable either by statute or at common law, is guilty of a breach of the peace of that government which exercises jurisdiction for the time being over the place where such offence is committed." Damon's Case, 6 Greenl. 148, 152. An act of Congress having erected nine of the western counties of Arkansas, and the part of the Indian country lying within the judicial district of this state, into a new judicial district to be styled the western district of Arkansas, and having provided that the residue of the state should remain a judicial district to be styled the eastern district of Arkansas; and having established terms of the district court within the western district, and conferred thereon circuit court jurisdiction—it was held, McLean, J., dissenting, not to take away the jurisdiction of the circuit court for the eastern district to try an indictment pending at the time of the passing of the act, for a murder committed in the Indian country. U. S. v. Dawson, 15 How. U. S. 467. See also Ex parte Jones, 49 Ark. 110, 4 S. W. 639; C. v. Brennan, 150 Mass. 63, 22 N. E. 628; Leschi v. Territory, 1 Wash. Ter. n. s. 13; Potter v. S., 42 Ark. 29.

84. Mass. Const., part 1, art. 13.

85. Wheeler v. S., 24 Wis. 52; Mayes v. S., 3 Heisk. 430; Alexander v. S., 3 Heisk. 475; Craig v. S., 3 Heisk. 227; Dougan v. S., 30 Ark. 41; Olive v. S., 11 Neb. 1, 7 N. W. 444; Speck v. S., 7 Bax. 46; S. v. Smiley, 98 Mo. 605, 12 S. W. 247; S. v. Kemp, 34 Minn. 61, 24

stitutional guaranty of prosecution by "indictment,"[86] or of "trial by jury,"[87]—either expression including the idea that the proceeding shall be in the locality of the offence, according to the common-law construction. Still,—

2. **Waived.**—This sort of provision, being for the benefit of defendants, may be waived by them;[88] as,—

3. **Change of Venue.**—If one applies to the court for a change of venue,[89] he waives his right to be tried in the county where indicted. A statute, therefore, allowing such change, does not conflict with this constitutional provision.[90] But the change can be only with his consent.[91]

4. **In the Absence of Waiver,**—the general rule established by these constitutional provisions may be subject to slight qualifications, growing out of its reasons,[92] out of necessity,[93] and out of the particular constitutional terms.[94] To explain,—

5. **Blow in one County, Death in another.**—After a blow in one jurisdiction and death in another, opinion is divided

N. W. 349; S. v. Albee, 61 N. H 423, 60 Am. R. 325; S. v. Carroll, 55 Wash. 588, 104 P. 814; S. v. McAllister, 65 W. Va. 97, 63 S. E. 758.

86. Ex parte Slater, 72 Mo. 102. But see post, § 61 (4), note.

87. Swart v. Kimball, 43 Mich. 443, 5 N. W. 635; P. v. Powell, 87 Cal. 348, 25 P. 481; post, § 922 (1).

88. New Crim. Law, I, §§ 995-1007; post, §§ 117-126; S. v. Potter. 16 Kan. 80; S. v. Albee, 61 N. H. 423, 60 Am. R. 325; Oborn v. S., 143 Wis. 249, 126 N. W. 737.

89. Post, § 67a et seq.

90. Dula v. S., 8 Yerg. 511; Perteet v. P., 70 Ill. 171; Kennison v. S., 83 Neb. 391, 119 N. W. 768; S. v. Kindig, 55 Kan. 113, 39 P. 1028; S. v. Knapp, 40 Kan. 148, 19 P. 728; S. v. Hatch, 91 Mo. 568, 4 S. W. 502; S. v. McGraw, 87 Mo. 161.

91. S. v. Denton, 6 Coldw. 539; Wheeler v. S., 24 Wis. 52. See also Dougan v. S., 30 Ark. 41; post, § 112.

92. Stat. Crimes, §§ 102, 188-190e, 226, 232, 235, constitutions being in the main interpreted like statutes. Ib., § 92.

93. Ante, § 7; Stat. Crimes, § 132.

94. S. v. Lowe, 21 W. Va. 782. For example, a constitutional provision requiring an "indictment," or a "trial by jury," would not be violated by a statute in the terms of that of Edw. recited post, § 52, in a state wherein this statute was already a part of the common law, while yet, by the better doctrine, it would be counter to a provision requiring the indictment to be in the county of the offence.

as to which is the county of the homicide, or whether either is.[95] A statute authorizing prosecution in the county of the death has been held not to violate the Massachusetts Constitution.[96] On the other hand, most courts, whatever they might deem of this case,[97] would sustain a statute authorizing a trial in the county of the blow;[98] and some, at least, would reject the Massachusetts doctrine.[99] Further as to which,—

§ 51. 1. **Evidence and Fact, distinguished.**—There is a difference between an act and the evidence of it. So that a witness from another county may testify to what was done there tending to prove a crime here.[1] Overlooking which distinction, the courts are said to have anciently doubted whether, on a blow in one county and death in another, the offence could be prosecuted in either.[2] "The difficulty," says Starkie,[3] "was frequently avoided by carrying the dead body back into the county where the blow was struck, and there the jury might inquire both of the stroke and of the death." But—

95. New Crim. Law, I, §§ 112-116, and note to § 115; post, § 51; S. v. Bowen, 16 Kan. 475; S. v. Gessert, 21 Minn. 369.

96. C. v. Parker, 2 Pick. 550. And see Tippins v. S., 14 Ga. 422; Steerman v. S., 10 Misso. 503; S. v. Pauley, 12 Wis. 537; C. v. Costley, 118 Mass. 1; Archer v. S., 106 Ind. 426, 7 N. E. 225; Ex parte McNeeley, 36 W. Va. 84, 32 Am. St. 831, 14 S. E. 436, 15 L. R. A. 226; Green v. S., 66 Ala. 40, 41 Am. 744; Smith v. S., 42 Fla. 605, 28 So. 758; Archer v. S., 106 Ind. 426, 7 N. E. 225; Stout v. S., 76 Md. 317, 25 A. 299; post, § 52.

97. S. v. Sweat, 16 S. C. 624.

98. Green v. S., 66 Ala. 40, 41 Am. 744; U. S. v. Guiteau, 1 Mackey 498; S. v. Jones, 38 La. An. 792; Archer v. S., 106 Ind. 426, 7 N. E. 225; Stout v. S., 76 Md. 317, 25 A. 299; S. v. Blunt, 110 Mo. 322, 19 S. W. 650; Rex v. Hargrave, 5 C. & P. 170, 24 E. C. L. 509; 1 East P. C. 361; 1 Hale P. C. 426.

99. S. v. Kelly, 76 Me. 331.

1. See Respublica v. Malin, 1 Dall. 33; S. v. Wisdom, 8 Port. 511; U. S. v. Britton, 2 Mason 464; C. v. Parmenter, 5 Pick. 279; Bland v. P., 3 Scam. 364; Reg. v. Bleasdale, 2 Car. & K. 765; 1 Stark. Crim. Pl., (2d Ed.), 21-23.

2. "Though the more common opinion was that he might be indicted where the stroke was given." 1 Hale P. C. 426; 1 East. P. C. 361; and see pp. 363, 365 et seq., 4 Bl. Com. 304; 1 Chitty C. L. 177; 3 Inst. 48; 1 Hawk. P. C. (6th Ed.), c. 31, § 13.

3. 1 Stark. Crim. Pl. (2d Ed.), 3, 4, note. And see Benson v. Offley, 2 Show. 510; s. c. nom. Bauson v. Offley, 3 Salk. 38.

2. **The True Doctrine,**—perhaps universally accepted at the time of writing the present edition, is, that the blow is murder or not according as it produces death or not within a year and a day;[4] whence, in all cases without the aid of any statute, an indictment lies in the county where the blow was inflicted.[5] Therefore, also,—

3. **Stroke on Sea, Death on Land.**—We may hesitate to hold, with some inferior United States courts, that where the stroke is on the ocean and the death on land, there is no "murder committed on the high seas," within the act of Congress.[6]

4. C. v. Roby, 12 Pick. 496, 505, 506; Burns v. P., 1 Par. Cr. 182, 185; P. v. Gill, 6 Cal. 637; S. v. Gessert, 21 Minn. 369; S. v. Bowen, 16 Kan. 475. "The giving of the blows which caused the death constitutes the felony." Patteson, J., in Rex v. Hargrave, 5 Car. & P. 170; New Crim. Law, I, §§ 113-116.

5. U. S. v. Guiteau, 1 Mackey 498; Green v. S., 66 Ala. 40, 45; S. v. Kelly, 76 Me. 331, 335; S. v. Bowen, 16 Kan. 475, 478, 479; Riley v. S., 9 Humph. 646, as to which case, see S. v. Pauley, 12 Wis. 537; Ex parte McNeeley, 36 W. Va. 84, 32 Am. St. 831, 14 S. E. 436; post, § 52; Rex v. Burdett, 4 B. & Ald. 95, 173. By statute in some states the venue may be in either county. Smith v. S., 42 Fla. 605, 28 So. 758; S. v. Fields, 51 La. Ann. 1239, 26 So. 99; S. v. Blount, 110 Mo. 322, 19 S. W. 600.

6. U. S. v. Magill, 1 Wash. C. C. 463; s. c. nom. U. S. v. McGill, 4 Dall. 426; U. S. v. Armstrong, 2 Curt. C. C. 446. There is seeming common-law authority for this. Coke says: "If a man be stricken upon the high sea, and dieth of the same stroke upon the land, this cannot be inquired of by the common law; because no *visne* can come from the place where the stroke was given (though it were within the sea pertaining to the realm of England, and within the liegeance of the king), because it is not within any of the counties of the realm. Neither can the admiral hear and determine this murder; because, though the stroke was within his jurisdiction, yet the death was *infra corpus comitatus*, whereof he cannot inquire; neither is it within the statute of 28 Hen. 8, because the murder was not committed on the sea. But by the Act of 13 Rich. 2, the constable and marshal may hear and determine the same. And before the making of the statute of 2 and 3 Edw. 6, if a man had been feloniously stricken or poisoned in one county, and after had died in another county, no sufficient indictment could thereof have been taken in either of the said counties; because, by the law of the realm, the jurors of one county could not inquire of that which was done in any other county." 3 Inst. 48. See Rex v. Farrel,

4. **Between Different Countries and States,**—we saw elsewhere how this is.[7] Further of—

§ 52. 1. **Blow and Death—Old English Statute.**—When the blow and death are within the State, and there is no legislative or constitutional change, the English 2 & 3 Edw. 6, c. 24, §2, which is common law with us,[8] applies. By it, "where any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, then an indictment thereof, founden by jurors of the county where the death shall happen, &c., shall be as good and effectual in the law as if the stroke or poisoning had been committed and done in the same county where the party shall die, or where such indictment shall be so founden."[9] Moreover,—

2. **Our own Statutes,**—not all of which are constitutional,[10] are in some of the States substantially in the terms of this old English one.[11] In other States the provision is that the indictment shall be in the county where the offence is committed,—generally, and by the better reasoning, construed to be the county of the blow.[12] These statutes should be interpreted by the rule that a new provision, without negative words, does not abrogate any prior law to which it is not repugnant, but both will stand together,[13]—a rule

1 W. Bl. 459; Riggs v. S., 26 Missis. 51; Steele v. Thacher, 1 Ware 91.

7. C. v. Linton, 2 Va. Cas. 205; S. v. Dunkley, 3 Ire. 116; New Crim. Law, I, §§ 110-123, 143. And see §§ 145-188a.

8. S. v. Moore, 6 Fost. N. H. 448; Riley v. S., 9 Humph. 646.

9. 2 Hawk. P. C. (Curw. Ed.), p. 302; Bauson v. Offley, 3 Salk. 38; 1 Stark. Crim. Pl. (2d Ed.), 5, 6. Statutes of this class are to be literally construed. Stat. Crimes, § 198. Query whether this one abolished the prior rule of the common law, whatever it was. Stat. Crimes, §§ 154-164.

10. Ante, § 50.

11. Stoughton v. S., 13 Sm. & M. 255; S. v. Toomer, Cheves, 106; Nash v. S., 2 Greene (Iowa), 286. In some of the states the provision is that the indictment may be in either county. S. v. Sweat, 16 S. C. 624.

12. Ante, § 51 (2); Riley v. S., 9 Humph. 646; S. v. Gessert, 21 Minn. 369; S. v. Bowen, 16 Kan. 475; S. v. Stout, 76 Md. 317, 25 A. 299.

13. Stat. Crimes, § 154 et seq. "In general," says Starkie, "where a statute creating a new felony, directs that the offender may be tried in the county in which he is apprehended, but contains no negative

which has sometimes in these cases been overlooked. Again,—

§ 53. 1. **Personal Presence**—is not an indispensable element in the locality. But, subject perhaps to a technical exception,[14] a crime is in law committed in the place where the doer's act takes effect, whether he is himself in such place or not. So that,—

2. **Offence abroad.**—In this way, one may even perpetrate an offence aganist a State or county upon whose soil he never set foot, as explained in "New Criminal Law."[15] Or, under the doctrine here,—

3. **In Homicide.**—One who, by discharging firearms from the shore within a county, kills another upon the high seas without the county, is triable for the murder by the admiralty, which has authority over the place where the ball took effect, but not over that where the offender stood to put it in motion.[16] Or, one who poisons another by the help of an innocent agent,[17] while personally absent, commits murder in the county where the poisoning is done.[18] So,—

4. **Crimes by Letter—(Libel—Threatening Letters—Forgery—False Pretences—Solicitation).**—A person who sends away a libel,[19] or a threatening letter,[20] or one enclosing a forged instrument to defraud the person ad-

words, he may be tried in that county in which the offense was committed." 1 Stark. Crim. Pl. (2d Ed.), 12, citing 1 Hale P. C. 694; 3 Inst. 87.

14. Post, § 58; New Crim. Law, I, § 111.

15. New Crim. Law, I, §§ 110, 111; C. v. Corlies, 3 Brews. 575; C. v. Smith, 11 Allen 243; S. v. Lord, 16 N. H. 357; Lindsey v. S., 38 Ohio St. 507. See S. v. Wyckoff, 2 Vroom 65.

16. Rex v. Coombes, 1 Leach, 388, 1 East P. C. 367; 1 Stark. Crim. Pl. (2d Ed.), 22, 23.

17. New Crim. Law, I, §§ 310, 651.

18. Anonymous, J. Kel. 53; 1 Stark. Crim. Pl. (2d Ed.), 23. Poisoned candy sent from one state to another. Trial had by statute in former state. P. v. Botkin, 9 Cal. 244, 98 P. 861, and see Robbins v. S., 8 Ohio St. 131.

19. C. v. Blanding, 3 Pick. 304, 15 Am. D. 214.

20. P. v. Griffin, 2 Barb. 427; Rex v. Girdwood, 1 Leach, 142, 2 East P. C. 1120; Esser's Case, 2 East P. C. 1125.

dressed,[21] or embodying a false pretence in response to which the goods are parted with where it is received,[22] or soliciting to a crime,[23] may be indicted in the county to which it is transmitted, though he does not go there himself. And—

5. **Neglects—(Bankruptcy—Repair of Way).**—A neglect to do an act—as, to surrender to a fiat in bankruptcy,[24] or repair a highway[25]—is punishable in the county where the act should have been done, and in no other.[26] Whence—

§ 54. 1. **Two Counties, Part in Each.**—A crime which consists of a series of acts, whereof a part are in one county and a part in another, cannot by the common-law rules be prosecuted in either, unless enough transpires in the one to constitute a complete offence.[27] Thus,—

2. **Abduction**—of an heiress, under 3 Hen. 7, c. 2, consisted of two acts, first, the taking of her away by force, secondly, her marriage; whereupon, if she was forcibly taken in one county, then, the constraint ceasing, carried into another where she was married, there could be no indictment in either; though, had the force continued, the offence would be complete in the latter county.[28]

§ 55. 1. **In Misdemeanor as in Felony.**—The doctrine that a complete offence must have been committed in the county of the indictment is applicable, in reason, to mis-

21. P. v. Rathbun, 21 Wend. 509. And see McGuire v. S., 37 Ala. 161.

22. Reg. v. Jones, 1 Den. C. C. 551, Temp. & M. 270, 1 Eng. L. & Eq. 533; Norris v. S., 25 Ohio St. 217, 18 Am. R. 291. And see Adams v. P., 1 Comst. 173; P. v. Adams, 3 Denio 190, 45 Am. D. 468; Reg. v. Leech, Dears. 642, 7 Cox C. C. 100, 36 Eng. L. & Eq. 589; Reg v. Cooke, 1 Fost. & F. 64.

23. Griffin v. S., 26 Ga. 493.

24. Reg. v. Milner, 2 Car. & K. 310.

25. Rex v. Clifton, 5 T. R. 498, 502, overruling Rex v. Weston, 4 Bur. 2507. And see Rex v. Great Broughton, 5 Bur. 2700.

26. Archb. New Crim. Pro. 74. See post, § 57.

27. Danby's Case, 1 Hale P. C. 652; 1 Stark. Crim. Pl. (2d Ed.), 2; Rex v. Burdett, 4 B. & Ald. 95, 172.

28. 1 Stark. Crim. Pl. (2d Ed.), 2; 1 East P. C. 453; Fulwood's Case, Cro. Car. 488, 1 Hale P. C. 660; Stat. Crimes, § 616 et seq. Abduction for prostitution is committed in county where female is induced to go away. S. v. Johnson, 115 Mo. 480, 22 S. W. 463.

demeanor the same as to felony. And the decisions make no distinction.[29] Yet there are writers who have blundered on this point, deeming that the application of the doctrine is less strict in misdemeanor.[30] The mistake arose from an imperfect apprehension of the just proposition that—

2. **In Misprision of Felony,**—since every felony includes a misprision of it, which is misdemeanor,[31] if one does in two counties what altogether amounts to a felony but not such in either, he may in either be prosecuted for the full misprision.[32] For a misprision[33] is a neglect to prevent a felony or treason, or to disclose it after its commission; so that the perpetrator of a felony completes a misprision of it in every county in which he does any part of it, or omits to make disclosure of what he has done.

§ 56. 1. Statutory Change.—In England, since we received thence our common law, legislation has authorized felonies and misdemeanors "begun in one county and completed in another" to be tried in either;[34] it is the same also in some of our States.[35] And we have a considerable variety of provisions working like results.[36] Moreover,—

2. **Implied by Statute—(Statutory Offence).**—The same may be implied by a statute; as, if it creates an offence which, in terms, consists of acts both within and without the State, an indictment will lie in the county wherein, within the State, the domestic part of the transaction occurs;[37] otherwise the enactment would be inoperative.[38] Obviously, too, a new offence entirely within the State may be created

29. Rex v. Burdett, 4 B. & Ald. 95, 136, cited 5 D. & R. 616; Pearson v. McGowran, 3 B. & C. 700, 5 D. & R. 616.

30. 1 Stark. Crim. Pl. (2d Ed.), 26; 1 Chit. Crim. Law 196.

31. New Crim. Law, I, § 717.

32. 1 Hale P. C. 652, 653.

33. New Crim. Law, I, § 717, 720.

34. 7 Geo. 4, c. 64, § 12; Reg. v. Leech, Dears. 642, 36 Eng. L. & Eq. 589; Rex v. Jones, 1 Russ. Crimes (5th Eng. Ed.), 5; Cleveland v. S., 7 Ga. App. 622, 67 S. E. 696.

35. S. v. Hollenbeck, 36 Iowa, 112; C. v. Costley, 118 Mass. 1.

36. Ex parte Baldwin, 69 Iowa, 502, 29 N. W. 428; Archer v. S., 106 Ind. 426, 7 N. E. 225; S. v. Jones, 38 La. Ann. 792.

37. 1 Stark. Crim. Pl. (2d Ed.), 9; 1 Hale P. C. 706; 3 Inst. 80.

38. Stat. Crimes, § 137.

by such statutory words as will bring it within the same principle; by necessary implication, therefore, authorizing proceedings in a county wherein a part only of the guilt was incurred.[39] Again,—

§ 57. 1. **How much in County of Indictment.**—From the common-law rule[40] that no more need be done within the county than is strictly necessary[41] to the crime, it follows that what is parcel of it or not at the election[42] of the prosecutor, or is mere evidence,[43] need not be taken into the account.[44] Thus,—

2. **Attempt.**—One who, as a step toward stealing in a warehouse, takes in another county an impression of the key from which to have a false one made, commits in the latter an indictable attempt; and there the indictment will lie, though afterward he has the key made in still another county.[45] Again, a form of attempt is soliciting another to commit a crime.[46] Therefore the indictment must evidently be in the county where the soliciting is done,—at least, if the other takes no step,—though the ultimate offence were to be in another county.[47] But—

3. **Substantive Misdemeanor.**—If the solicited person goes and does the thing in the other county, and it is misdemeanor, the one soliciting may then be held as a joint principal, guilty, not merely of the attempt, but of the substantive crime; the solicitation may be shown, not as constituting a part of the criminal act, but as evidence of the intent which accompanied it into the new locality;[48] and thus that becomes an offence in the second county, which, in another aspect, was a less offence in the first. Hence,—

39. And see Pope v. Davis, 2 Taunt. 252; Scott v. Brest, 2 T. R. 238, 241; Scurry v. Freeman, 2 B. & P. 381; S. v. Hudson, 3 Zab. 206.

40. Ante, § 54.

41. New Crim. Law, I. §§ 649, 650.

42. New Crim. Law, I § 791.

43. Ante, § 51 (1).

44. And see Skiff v. P., 2 Par. Cr. 139, 147.

45. Griffin v. S., 26 Ga. 493, 502.

46. New Crim. Law, I. § 767.

47. See Reg. v. Daniell, 6 Mod. 99, 101. And see Griffin v. S., 26 Ga. 493.

48. Ante, § 53.

4. **Rule in Misdemeanor—(Libel).**—The rule in misdemeanors is, that all who participate in them, whether present or absent, are indictable in the county in which they are committed.[49] Thus, says Starkie:[50] "If A procure B to publish a libel, A is liable to be indicted[51] in every county in which B publishes that libel.[52] So if A abroad procure false vouchers to be delivered in Middlesex, which he has fabricated for the purpose of fraud, he is indictable in Middlesex." [53]

§ 58. 1. **In Felony—Accessory before.**—Ordinarily legal reasoning would render this rule applicable equally in felony.[54] But we have seen[55] that the distinction between the accessory before the fact and the principal, in felony, is a mere technicality transmitted from the old common law,—a crystallized blunder. And it is often, in just doctrine, doubtful whether or not one error, established by authority, requires the courts to join another error to it. Therefore it was anciently uncertain whether the indictment against an accessory before the fact should be in the county of the enticement or in that of the accomplished felony.[56] So, to make all plain, 2 & 3 Edw. 6, c. 24, shown in a previous section to be common law with us,[57] provides, § 4, "that where any murder or felony hereafter shall be committed and done in one county, and another person or more shall be accessory or accessories in any manner of wise to any such murder or felony in any other county, that then an indictment found or taken against such accessory and accessories upon the circumstances of such matter, &c., in

49. 1 Stark. Crim. Pl. (2d Ed.), 28; U. S. v. King, 20 D. C. 404; C. v. Gillespie, 7 S. & R. 469, 478, 10 Am. D. 475; Rex v. Brisac, 4 East 164, 7 R. R. 551; compare S. v. Wilson, 79 N. J. L. 241, 75 A. 776.

50. 1 Stark. Crim. Pl. (2d Ed.), 28.

51. Rex v. Johnson, 7 East 65.

52. See also Rex v. Girdwood, 1 Leach 142, 2 East P. C. 1120.

53. Rex v. Brisac, 4 East 164. And see New Crim. Law, I, § 110.

54. S. v. Ayers, 8 Bax. 96, 98-100.

55. New Crim. Law, I, §§ 673-682, 685.

56. 2 Hawk. P. C. (Curw. Ed.), p. 454 and note 2; 1 Chit. Crim. Law 273. And see Rex v. Easterby, 2 Leach 947, Russ. & Ry. 37: Admiralty Case, 13 Co. 51.

57. Ante, § 52.

the county where such offences of accessory, &c., shall be committed or done, shall be as good and effectual in the law as if the said principal offence had been committed or done within the same county where the same indictment against such accessory shall be found."[58] Therefore with us generally, in the absence of any intervening statute, the accessory before the fact is indictable in the county wherein the accessorial act was done, though the principal felony transpired in another county.[59] But we have, in various States, statutory regulations of the subject; and—

2. **Constitution—(Statute).**—The Constitution[60] of Tennessee, having guaranteed a jury trial in the county in which the offence was committed, it was adjudged that an accessory before the fact to murder might be tried in the county where the murder was perpetrated, though the accessorial act was in another county; under a statute authorizing a crime partly in one county and partly in another to be prosecuted in either. As, in this case, what was done in either county must be supplemented by the doings in the other to make the accessory's guilt complete, the statute exactly applies, and it does not violate the Constitution.[61]

3. **Accessory after—(High Seas and Land).**—The above-recited statute of 2 & 3 Edw. 6, it is perceived, extends to the accessory after the fact; and clearly, as to him, its rule is simply what would come from the ordinary doctrines of the common law.[62] Still, as to him, if the principal offence is on the high seas, within the admiralty, and beyond the common-law jurisdiction, the English courts hold the crime of receiving the principal offender on land, and within the body of a county, not to be cognizable by the common-law tribunal.[63]

58. 2 Hawk. P. C. (Curw. Ed.), p. 455, § 50; 1 Stark. Crim. Pl. (2d Ed.), 5-7; S. v. Moore, 6 Fost. N. H. 448.

59. New Crim. Law, I, § 111; Tully v. C., 13 Bush 142; P. v. Hall, 57 How. Pr. 342; P. v. Hodges, 27 Cal. 340; Baron v. P., 1 Park. Cr. 246; S. v. Ellison, 49 W. Va. 70, 38 S. E. 574.

60. Ante, § 50 (1).

61. S. v. Ayers, 8 Baxt. (Tenn.) 96.

62. New Crim. Law, I, § 692.

63. Admiralty Case, 13 Co. 51. For "the common law cannot take

§ 59. *Further Applications of Doctrines:—*

1. **Choice of Counties.**—It follows that sometimes an offender may be indicted in one or another of two or more counties, at the election of the prosecuting power. The nature of the offence, too, may help this result; as,—

2. **In Larceny.**—Though, to constitute larceny, a taking and carrying away of the goods by trespass[64] and an intent to steal them[65] must concur, if, after one has done what completes the theft, he continues travelling away with and still intending to steal them, each step may be treated as a new trespass and fresh larceny; so that he may be indicted either in the county where he first took the goods, or in any other into which, the intent to steal continuing, he carries them.[66] How this doctrine applies to things stolen in an-

cognizance of the original offense, because that is done out of the jurisdiction of the common law; and, by consequence, where the common law cannot punish the principal the same shall not punish any one as accessory to such principal." P. 53.

64. New Crim. Law, II, § 799.

65. New Crim. Law, II, § 801.

66. Dir. & F., §§ 607, 608; Rex v. Thompson, 2 Russ. Crimes (3d Eng. Ed.), 116; S. v. Douglas, 17 Me. 193, 35 Am. D. 248; Tippins v. S., 14 Ga. 422; Green v. S., 115 Ga. 254, 41 S. E. 642; Anonymous, 1 Crawf. & Dix C. C. 192; Crow v. S., 18 Ala. 541; C. v. Cousins, 2 Leigh 708; S. v. Whaley, 2 Harring (Del.) 538; C. v. Rand, 7 Met. 475, 41 Am. D. 455; C. v. Simpson, 9 Met. 138; S. v. Bryant, 9 Rich. 113; P. v. Smith, 4 Par. Cr. 255; P. v. Garcia, 25 Cal. 531, 533; P. v. Staples, 91 Cal. 23, 27 P. 523; Reg. v. Rogers, (Law Rep.) 1 C. C. 136, 11 Cox (C. C.) 38; Aaron v. S., 39 Ala. 684; Cox v. S., 43 Tex. 101; S. v. Ware, 69 Mo. 332; S. v. Margerum, 9 Bax. 362; Shubert v. S., 20 Tex. Ap. 320; Lucas v. S., 62 Ala. 26; Kidd v. S., 83 Ala. 58, 3 So. 442; S. v. Lillard, 59 Iowa 479, 13 N. W. 637; S. v. Wade, 55 Kan. 693, 41 P. 951; S. v. Sullivan, 49 La. Ann. 197, 21 So. 688; Com. v. Rubin, 165 Mass. 453, 43 N. E. 200; Com. v. Hayes, 140 Mass. 366, 5 N. E. 264; S. v. Merrill, 68 Vt. 60, 33 A. 1070, 54 Am. St. 870; S. v. Kyle, 14 Wash. 550, 45 P. 147; Powell v. S., 52 Mo. 217, 9 N. W. 17. In some of our states this is specially provided by statute. S. v. Brown, 8 Nev. 208; S. v. Johnson, 38 Ark. 568; Dixon v. S., 15 Tex. Ap. 480; Allen v. S., 4 Tex. Ap. 581. This doctrine was held not applicable to slave-stealing. S. v. Groves, Busbee, 191.

Change of statute. On this principle, if, between the original theft and the finding of the indictment, the statute relating to larceny has been superseded by a new one, the thief, who retains possession of the goods, may be proceeded against under the new statute. S. v. Somerville, 21 Me. 14, 38 Am. D. 248.

other State or country than that of the indictment we saw in another connection.[67] It is immaterial to this result whether the taking to the new county is immediate, or long after the original theft.[68] But it must be felonious in the new county; as, for example, no jurisdiction is given by the offender's having the goods about him while, being under arrest for the theft, he is being transported with them into the new county by the officer.[69] Hence,—

§ 60. 1. **Simple and Compound Larcenies, distinguished—Robbery.**—If the larceny in the first county is compound,—as, if committed by robbery,—the conviction in the second can be only for the simple larceny, not including its aggravations; for they took place only in the first county.[70] Or,—

2. **Thing changed—Name of it.**—If, before the thing stolen reached the second county, it was so changed as to be known by a different name,—for example, if, where stolen, it was a "brass furnace," but the thief broke it into fragments in the first county, and carried them into the second,—the indictment, to be adequate in the second, must describe it by its name there; as, in the illustration, "certain pieces of brass," instead of a "brass furnace."[71] Likewise,—

3. **Joint or Several.**—If four persons commit a joint larceny in one county, and there divide the goods, then convey

67. New Crim. Law, I. §§ 136-142.

68. Rex v. Parkin, 1 Moody 45.

69. Rex v. Simmonds, 1 Moody 408.

70. Haskins v. P., 16 N. Y. 344, 348; 2 Russ. Crimes (3d Eng. Ed.), 118; Rex v. Thomas, 2 East P. C. 605, 2 Leach 634; 1 Hale P. C. 507, 508, 536; 2 Ib. 163; Sweatt v. S., 90 Ga. 315, 17 S. E. 273. And see Rex v. Millar, 7 Car. & P. 665; S. v. Groves, Busbee, 191; Reg. v. Newland, 2 Cox C. C. 283.

71. Rex v. Halloway, 1 Car. & P. 127. And see Rex v. McAleece, 1 Crawf. & Dix C. C. 154; Anonymous, 1 Crawf. & Dix. C. C. 192; Rex v. Edwards, Russ. & Ry. 497. An indictment for stealing "two turkeys" is not sustained by proof that they were taken alive and killed in another county, then brought into this; because, the court said, the words "two turkeys" imply live ones, and the charge "ought to have been for stealing two dead turkeys." Rex v. Holloway, 1 Car. & P. 128. See Dir. & F., § 592; Vol. II, § 708.

them in separate parcels to another, they cannot in the latter be held jointly, but each is there guilty of a several larceny of his separate parcel;[72] while, on the other hand, if they commit in the latter county a sufficient joint trespass, with intent to steal, whether they brought the goods to it severally or jointly, they are liable jointly.[73] Of course,—

4. **Under Statute or Common Law.**—In the application of these principles, it is immaterial[74] whether the larceny is under a statute or at the common law.[75]

§ 60 a. 1. **Other Offences**—are not, in general, within the reason of these rules for larceny, as to the election of counties, so not governed by them. Thus,—

2. **Receiving Stolen Goods—False Pretences.**—One who in a particular county receives stolen goods,[76] or obtains things by false pretences,[77] is not indictable in another county into which he carries them. Yet—

§ 61. 1. **By Letter through Mail—(Duel—Libel—Forgery—Bribery).**—It has been held, while still in reason the doctrine seems open to some qualification, that a man who

72. Rex v. Barnett, 2 Russ. Crimes (3d Eng. Ed.), 117. See Rex v. Dann, 1 Moody, 424; Rex v. Smith, 1 Moody, 289.

73. Rex v. County, 2 Russ. Crimes (3d Eng. Ed.), 118; C. v. Dewitt, 10 Mass. 154. See Rex v. McDonagh, Car. Crim. Law (3d Ed.), 24.

74. Stat. Crimes, §§ 139, 140.

75. C. v. Simpson, 9 Met. 138; C. v. Rand, 7 Met. 475, 41 Am. D. 455; Crow v. S., 18 Ala. 541. And see S. v. Whaley, 2 Harring. Del. 538; Rex v. Thomas, 2 East P. C. 605, 2 Leach 634; Rex v. Millar, 7 Car. & P. 665, may well be deemed to have turned on a question of evidence; and whether the reporter's note is right, query.

76. Roach v. S., 5 Coldw. 39; S. v. Rider, 46 Kan. 332, 26 P. 745; S. v. Habib, 18 R. I. 558, 30 A. 462; Thurman v. S., 37 Tex. Cr. 646, 40 S. W. 795. And see P. v. Stakem, 40 Cal. 599; Wills v. P., 3 Par. Cr. 473.

77. Reg. v. Stanbury, 8 Jur. N. S. 84, 5 L. T. N. S. 686, 10 W. R. 236, Leigh & C. 128, 9 Cox C. C. 94; P. v. Cummings, 123 Cal. 269, 55 P. 898; Connor v. S., 29 Fla. 455, 10 So. 891; S. v. Tripp, 113 Ind. 698, 84 N. W. 546; P. v. Arnold, 46 Mich. 268, 9 N. W. 406; S. v. Terry, 109 Mo. 601, 19 S. W. 206; Norris v. S., 25 Ohio St. 217, 18 Am. 291; Com. v. Karponski, 167 Pa. St. 225, 31 A. 572. Contra by statute. Moseley v. S., 36 Tex. Cr. 378, 38 S. W. 197.

deposits in the post-office a letter provoking a challenge to a duel,[78] or containing a libel[79] or forgery[80] or offer to bribe,[81] is answerable in the county where he deposits it;[82] though, as we have seen, [83] he is so also in the county to which it goes. The principle, suggestive also of the qualifications, is that the deposit of the letter is an act sufficient to complete, if not the substantive offence, at least the indictable attempt.[84] So—

2. **Embezzlement**—may, in various circumstances, be deemed committed in any one of several counties, at the election of the prosecuting power.[85] And—

3. **Conspiracy**,—indictable indeed only in some county where occurred the unlawful combination of wills[86] necessary to constitute it,[87] may, under the rule that conspirators renew the conspiracy with every act done by any one of them in carrying it into execution, be prosecuted either in the county where their wills originally combined, or in any other wherein, pursuant thereto, any overt act is performed.[88] But—

78. Rex v. Williams, 2 Camp. 506. And see Rex v. Burdett, 4 B. & Ald. 95, 127.

79. Rex v. Burdett, 3 B. & Ald. 717, 4 B. & Ald. 95, 6 E. C. L. 404; Com. v. Blanding, 3 Pick. (Mass.) 304.

80. Perkin's Case, 2 Lewin, 150; S. v. Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775; Dent v. S., 43 Tex. Cr. App. 126, 65 S. W. 627.

81. U. S. v. Worrall, 2 Dall. 384, 388.

82. And see Rex v. Johnson, 7 East, 65, 3 Smith, 94; Rex v. Watson, 1 Camp. 215; Rex v. Williams, 2 Camp. 506; Newsome v. S., 1 Ga. Ap. 790, 58 S. E. 71.

83. Ante, § 53.

84. And see New Crim. Law, I, §§ 204, 727; II, §§ 926, 927;

85. Rex v. Taylor, 2 Leach, 974, Russ. & Ry. 63, 3 B. & P. 596; Rex v. Hobson, 1 East P. C. Add. xxiv, 2 Leach, 974; Reg. v. Murdock, 8 Eng. L. & Eq. 577; Reg. v. Rogers, 3 Q. B. D. 28, 14 Cox C. C. 22; Reg. v. Peters, 16 Q. B. D. 636, 16 Cox C. C. 36; Ex parte Palmer, 86 Cal. 631, 25 P. 130; Robson v. S., 83 Ga. 166, 9 S. E. 610; Spalding v. P., 172 Ill. 40, 49 N. E. 99; S. v. Hengen, 106 Iowa, 711, 77 N. W. 453; Cole v. S., 16 Tex. Ap. 461; Reed v. S., 16 Tex. Ap. 586; 1 Stark. Crim. Pl. (2d Ed.), 25, 26; Yost v. S. (Tex. Cr. Ap.), 38 S. W. 192; Knight v. S., 152 Ala. 56, 44 So. 585.

86. Reg. v. Best, 1 Salk. 174; S. v. Nugent, 77 N. J. L. 84, 71 A. 485.

87. New Crim. Law, I, §§ 432, 592.

88. C. v. Gillespie, 7 S. & R. 469, 478, 10 Am. D. 475; P. v. Mather, 4 Wend. 229, 259, 21 Am. D. 122;

4. **Burglary.**—The breaking, without which there can be no burglary, is possible only in the one county wherein is situated the place broken. So that a statute authorizing a conviction for burglary in any county into which the goods taken are carried, is void as contrary to a constitution[89] giving the offender the right to be tried in the county of the offence.[90] But this sort of statute is valid in the absence of such a constitutional provision.[91]

§ 62. *Further of Statutory Changes:—*

English, as Common Law.—Besides the before-mentioned English statute of 2 & 3 Edw. 6 c. 24, which we have seen to be common law with us,[92] there are others of dates early enough to be such,[93] but they are either in nature local to the mother country, or otherwise of no practical importance in this.[94]

Rex v. Brisac, 4 East, 164; Rex v. Bowes, cited 4 East, 171; C. v. Corlies, 3 Brews. 575, 8 Phila. 450; C. v. Westervelt, 11 Phila. 461; Hazen v. Com., 23 Pa. St. 355; Com. v. Gillespie, 7 S. & R. 469, 10 Am. D. 465; International Harvester Co. v. Com., 137 Ky. 668, 126 S. W. 352; P. v. Arnold, 46 Mich. 268, 9 N. W. 406; Dawson v. S., 38 Tex. Cr. Ap. 9, 40 S. W. 731; U. S. v. Newton, 52 Fed. 275.

89. Ante, § 50 (1). S. v. Carroll, 55 Wash. 588, 104 P. 814.

90. S. v. McGraw, 87 Mo. 161.

91. Mack v. P., 82 N. Y. 235. The Constitution of New York gave the right to be tried only on "presentment or indictment of a grand jury;" and this was held to give no protection as to the county, contrary to what would probably have been the result in Missouri. Ante, § 50 (1).

92. Ante, § 52, 58.

93. See 1 Stark. Crim. Pl. (2d Ed.), 9-20.

94. **County of arrest—polygamy.** The statute 1 Jac. 1, c. 11, against polygamy (and see Stat. Crimes, §§ 579, 580), provided, in § 1, that the offender under it might be tried in any county where he should be apprehended. 1 Stark. Crim. Pl. (2d Ed.), 11. But I presume it is superseded in all the States by more recent legislation in the same or other terms. Stat. Crimes, §§ 112, 586-588, 599. Under it, the English courts decided that one taken into custody on a charge of larceny may be detained for polygamy, and such detaining will be an apprehension authorizing an indictment in the same court for the polygamy. Rex v. Gordon, Russ. & Ry., 48. See further, as to this provision, and the form of indictment upon it, in England and this country, Reg. v. Whiley, 2 Moody, 186, 1 Car. & K. 150; Collins v. P.,

§ 63. 1. **On Vessel navigating River.**—Some of the States have statutes, in terms not quite uniform, providing that an offence committed on any vessel navigating a river or canal may be prosecuted, as expressed in one of them, "in any county through which, or any part of which, such vessel may be navigated in the course of the same voyage or trip, or in the county where such voyage or trip shall terminate."[95] And there is a like enactment in England.[96] In some circumstances or States, this sort of legislation is plainly enough constitutional.[97] But our constitutions differ, and under some of them this might not be so adjudged.[98]

2. **Borders of Counties.**—Other statutes permit offences committed within a defined distance from county lines (the measurement construed to be straight and not by the shortest road)[99] to be prosecuted in either county.[1] This was held not violative of the constitutional guaranty of a trial in the "county *or district*" where the offence was committed.[2] But it is commonly deemed contrary to a clause

4 Thomp. & C. 77, 1 Hun, 610; S. v. Griswold, 53 Mo. 181; King v. P., 5 Hun, 297. And see Reg. v. Smythies, 1 Den. C. C. 498, 2 Car. & K. 878; Mitchell v. S., 19 Ind. 381; Newcome v. S., 27 Ind. 10; S. v. Fitzgerald, 75 Mo. 571.

95. As to the construction in New York, see P. v. Hulse, 3 Hill (N. Y.), 309; Manley v. P., 3 Seld. 295. In other States, Nash v. S., 2 Greene, Iowa, 286; Steerman v. S., 10 Misso. 503; S. v. Timmens, 4 Minn. 325; Powell v. S., 52 Wis. 217, 9 N. W. 17. As to offenses on railroad trains, P. v. Dowling, 84 N. Y. 478.

96. 7 Geo. 4, c. 64, § 13; Reg. v. Sharpe, Dears, 415; s. c. nom. Reg. v. Sharp, 24 Law J. M. C. 40, 29 Eng. L. & Eq. 532; Reg. v. Pierce, 6 Cox C. C. 117.

97. Steerman v. S., 10 Misso. 503. And see Wood v. Steamboat Fleetwood, 27 Mo. 159. But see Craig v. S., 3 Heisk. 227.

98. Ante, §§ 50, 51, 58; Stat. Crimes, § 587.

99. Reg. v. Wood, 5 Jur. 225. And see Jackson v. S., 90 Ala. 590, 8 So. 862.

1. Willis v. S., 10 Tex. App. 493; Reg. v. Gallant, 1 Fost. & F. 517; Jackson v. S., 90 Ala. 590, 8 So. 862; S. v. Rockwell, 82 Iowa, 429, 48 N. W. 721; P. v. Hubbard, 86 Misc. 440, 49 N. W. 265; S. v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. 388.

2. S. v. Robinson, 14 Minn. 447, 453; S. v. Anderson, 25 Minn. 66; S. v. Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. 388; S. v. McDonald, 109 Wis. 506, 85 N. W. 502; Jackson v. S., 90 Ala. 590.

having only the word "county."[3] The indictment, where the offence was in an adjoining county, properly alleges, according to the fact, that it was committed therein, within the statutory distance, which it states, of the dividing line between such county and that of the indictment.[4] We have authority also for the further proposition, that the allegation may equally well be of doings in the county where the court sits, and it will be sustained by proof that they were in the adjoining county within the statutory distance.[5]

II. *As to Crimes against the United States.*

§ 64. 1. **The Constitution**—of the United States has the provision, not extending to the States,[6] that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."[7] And an amendment adds: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."[8]

2. **These Provisions combined**—work the result that a crime against the United States, committed within State territory, can be prosecuted only within the State and dis-

3. S. v. Lowe, 21 W. Va. 782, 789, 793, 45 Am. 570; Buckrice v. P., 110 Ill. 29; Dougan v. S., 30 Ark. 41; Craig v. S., 3 Heisk. 227; Armstrong v. S., 1 Coldw. 338. See, also, cases cited in last note.

4. S. v. Robinson, 14 Minn. 447; P. v. Davis, 56 N. Y. 95.

5. S. v. Masteller, 45 Minn. 128, 47 N. W. 541; S. v. Pugsley, 75 Iowa, 742, 38 N. W. 498; Abrigo v. S., 29 Tex. App. 143, 15 S. W. 408. And see Ruffin v. C., 21 Grat. 790; Chivarrio v. S., 15 Tex. App. 330; Prendez v. S., 7 Tex. App. 587.

6. Twitchell v. C., 7 Wall. 321; Withers v. Buckley, 20 How. U. S. 84, 89; Fox v. Ohio, 5 How. U. S. 410, 434; Barron v. Baltimore, 7 Pet. 243. See post, § 891.

7. Const. U. S., art. 3, § 2, cl. 3.

8. Const. U. S. Amendm., art. 6; U. S. v. Britton, 2 Mason, 464. As to the two provisions together, see Cook v. U. S., 138 U. S. 157, 181.

trict of its commission; for what is done outside of State limits, Congress may fix such place of trial as it chooses.[9]

§ 65. **Statutes,**—which the reader will find on proper looking, and which have undergone minor changes since their original enactment, have supplemented these provisions. By one antedating the Constitution, "in cases punishable with death, the trial shall be had in the county where the offence was committed; or, where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence."[10] It was adjudged not to be repealed by the Constitution;[11] yet it may have been in some slight degree modified by subsequent legislation.[12] The courts deemed themselves to comply with it when they summoned the jurors from such county, without resorting to the difficult and doubtful expedient of ordering a special term to be there held.[13] The Revised Statutes have more general provisions for the summoning of jurors;[14] and, as to the county, they simply ordain that "the trial of offences punishable with death shall be had in the county where the offence was committed, where that can be done without great inconvenience."[15]

§ 66. **In State—Brought in.**—We see that while crimes within the State must be prosecuted there,[16] and the district must have been previously ascertained by law,[17] the trial of most others will be in the State and district into which the offender is first brought.[18] Being brought within

9. Cook v. U. S., 138 U. S. 157, 11 S. Ct. 268; In re Rosdeitscher, 33 Fed. 657. And see U. S. v. Rogers, 23 Fed. 658; The Idaho, 12 Saw. 156, 29 Fed. 187; U. S. v. Holtzhauer, 40 Fed. 76.

10. 1 U. S. Stats. at Large, p. 88, Act of Sept. 24, 1789, c. 20, § 29; U. S. v. Burr, 1 Burr's Trial (Phila. Ed.), 352; U. S. v. Cornell, 2 Mason, 91, 96; U. S. v. Wilson, Bald. 78, 117.

11. U. S. v. Burr, 1 Burr's Trial (Phila. Ed.), 352, 353.

12. U. S. v. Cornell, 2 Mason, 91, 96.

13. See the several cases before cited.

14. R. S. of U. S., § 802 et seq.

15. Ib., § 729.

16. Ante, § 64.

17. U. S. v. Maxon, 5 Blatch. 360; U. S. v. Jackalow, 1 Black, 484; U. S. v. Bird, 1 Sprague, 299.

18. Jones v. U. S., 137 U. S. 202, 11 S. Ct. 80.

the district means brought into custody, and not merely conveyed thither by the ship in which the offender first arrives.[19] As to crimes on "the high seas or elsewhere, out of the limits of any State or district," the old and new provisions are substantially alike,—the former being that the trial "shall be in the district where the offender is apprehended, or into which he may be first brought;"[20] the latter, that it "shall be in the district where the offender is found, or into which he is first brought."[21] The Revised Statutes further provide that "when any offence against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."[22]

§ 67. **How Place determined.**—The United States courts do not take judicial cognizance of boundaries, when inquiring into the jurisdiction. Thus, a verdict which found the offence to have been committed at a place named, not adding in what State, was set aside; because the locality did not thereupon become "a simple question of law. The description of a boundary," added Nelson, J., "may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it as thus described and interpreted, with a view to its location and settlement, belongs to the jury."[23]

19. U. S. v. Bird, supra; U. S. v. Arwo, 19 Wall. 486.

20. 4 U. S. Stats. at Large, p. 118, Act of 1825, c. 65, § 14. See, for the interpretation of this provision, U. S. v. Arwo, 19 Wal. 486; post, § 66. And see The Octavia, 1 Gallis. 488; U. S. v. Thompson, 1 Sumner, 168; observations of Nelson, J., in Craig v. S., 3 Heisk. 227, 230, 231.

21. R. S. of U. S., § 730. See In re Charge to Grand Jury, 30 Fed. Cas. 18, 274; 2 Sprague, 292.

22. Ib., § 731. Wynne v. U. S., 217 U. S. 234, 30 S. Ct. 447, and see U. S. v. Murphy, 91 Fed. 120; U. S. v. Noblom, 27 Fed. Cas. 15, 896.

23. U. S. v. Jackalow, 1 Black, 484, 487. Compare with post, § 378.

CHAPTER V.

CHANGE OF VENUE.

Consult—the last chapter, and places referred to at the beginning of it.

§ 67 a. **How Chapter divided.**—We shall consider, I. The Doctrine in General; II. For what Causes granted; III. Questions of Practice; IV. Constitutional Questions.

I. *The Doctrine in General.*

§ 67 b. **Defined.**—A change of venue is the removal, by order of court, of a cause pending therein to an adjoining county for trial.[24]

§ 68. 1. **English Doctrine.**—Said Lord Mansfield: "The law is clear and uniform as far back as it can be traced. Where the court has jurisdiction of the matter, if from any cause it cannot be tried *in* the place, it shall be tried as *near* as may be. . . . Where an impartial trial cannot be had in the proper county, it shall be tried in the next." [25]

24. I should add "and the further proceedings" (see, for example, S. v. Hayes, 88 Mo. 344), but—**Meaning of "Trial"**—the word 'trial,' in a connection like this, appears to include such further proceedings; not being necessarily limited to what is done before the jury. Reg. v. Castro, (Law Rep.), 9 Q. B. 350; S. v. Shepherd, 8 Ire. 195; Stat. Crimes, § 347a.

25. Rex v. Cowle, 2 Bur. 834, 859. To the like effect, see 3 Black. Com. 294; 1 Stark. Crim. Pl. (2d Ed.), 30; 1 Chit. Crim. Law, 201; Rex v. Hunt, 3 B. & Ald. 444; 2 Chit. 130, 5 E. C. L. 259; Reg. v. Wilts, 6 Mod. 307; Rex v. Nottingham, 4 East, 208; Rex v. Clendon, 2 Stra. 911; Rex v. Holden, 5 B. & Ald. 347, 354, 355, 2 Nev. & M. 167, 27 E. C. L. 151; Reg. v. Palmer, 5 Ellis & B. 1024, 34 Eng. L. & Eq. 290; S. v. Hassan, 149 Iowa, 518, 128 N. W. 960.

2. **Diverse American.**—Most of our States, not all, permit in proper circumstances the change of venue; generally by statutes partially differing in their terms.[26]

26. Some of the cases from the States allowing this proceeding are:

Alabama. Innerarity v. Hitchcock, 3 Stew. & P. 9; S. v. Brookshire, 2 Ala. 303; S. v. Ware, 10 Ala. 814; Hall v. S., 15 Ala. 431; Ex parte Remson, 23 Ala. 25; Harrall v. S., 26 Ala. 52; Brister v. S., 26 Ala. 107; Ex parte Rivers, 40 Ala. 712; Ex parte Chase, 43 Ala. 303; Ex parte Bryan, 44 Ala. 402; Murphy v. S., 45 Ala. 32; Williams v. S., 48 Ala. 85; Taylor v. S., 48 Ala. 180; Ex parte Dennis, 48 Ala. 304; Kelly v. S., 52 Ala. 361; Ex parte Hodges, 59 Ala. 305; Dunn v. S., 60 Ala. 35; Jones v. S., 77 Ala. 98; Shackleford v. S., 79 Ala. 26; Seams v. S., 84 Ala. 410, 4 So. 521; Fallin v. S., 86 Ala. 13, 5 So. 423; Hawes v. S., 88 Ala. 37, 7 So. 302; Salm v. S., 89 Ala. 56, 8 So. 66.

Arkansas. Edwards v. S., 25 Ark. 444; S. v. Jones, 29 Ark. 127; S. v. Flynn, 31 Ark. 35; Hudley v. S., 36 Ark. 237; Ball v. S., 48 Ark. 94, 2 S. W. 462.

California. P. v. Stillman, 7 Cal. 117; Smith v. The Judge, 17 Cal. 547; P. v. Sexton, 24 Cal. 78; P. v. Congleton, 44 Cal. 92; P. v. Cotta, 49 Cal. 166; P. v. Perdue, 49 Cal. 425; P. v. Yoakum, 53 Cal. 566; P. v. McGarvey, 56 Cal. 327.

Colorado. Christ v. P., 3 Colo. 394; Hughes v. P., 5 Colo. 436; Roberts v. P., 9 Colo. 458, 13 P. 630; Mullin v. P., 15 Colo. 437, 22 Am. St. 414, 24 P. 880.

Dakota. Territory v. Egan, 3 Dak. 119, 13 N. W. 568.

Delaware. S. v. Burris, 4 Harring. (Del.), 582.

Florida. Ammons v. S., 9 Fla. 530; Johns v. Johns, 17 Fla. 806; Irvin v. S., 19 Fla. 872; S. v. King, 20 Fla. 19.

Georgia. Wheeler v. S., 42 Ga. 306; Hunter v. S., 43 Ga. 483; Brinkley v. S., 54 Ga. 371; Blalock v. Pillsbury, 76 Ga. 493; Blackman v. S., 80 Ga. 785, 7 S. E. 626.

Illinois. Clark v. P., 1 Scam. 117; Gardner v. P., 3 Scam. 83; P. v. Scates, 3 Scam. 351; Brennan v. P., 15 Ill. 511; Maton v. P., 15 Ill. 536; Perteet v. P., 65 Ill. 230; Rafferty v. P., 66 Ill. 118; Bryant v. Ballance, 66 Ill. 188; Perteet v. P., 70 Ill. 171; Hanna v. P., 86 Ill. 243; McCann v. P., 88 Ill. 103; McCauley v. P., 88 Ill. 578; Swanson v. P., 89 Ill. 589; Barr v. P., 103 Ill. 110; P. v. Zane, 105 Ill. 662; Carrow v. P., 113 Ill. 550; Tucker v. P., 122 Ill. 583, 13 N. E. 809; Haskins v. P., 14 Bradw. 198.

Indiana. Findley v. S., 5 Blackf. 576, 36 Am. D. 557; In re Taylor, 4 Ind. 479; Pulling v. S., 16 Ind. 458; Goldsby v. S., 18 Ind. 147; Vail v. McKernan, 21 Ind. 421; Hurt v. S., 26 Ind. 106; Anderson v. S., 28 Ind. 22; Galloway v. S., 29 Ind. 442; Bailey v. S., 39 Ind. 438; Mershon v. S., 44 Ind. 598; Vanderkarr v. S., 51 Ind. 91; Manly v. S., 52 Ind. 215; Bissot v. S., 53 Ind. 408; Yater v. S., 58 Ind. 299; Gordon v. S., 59 Ind. 75; S. v. Newton, 62 Ind. 517; Fawcett v. S., 71 Ind. 590; Leslie v. S., 83 Ind. 180; Duncan v. S., 84 Ind. 204; Hunnel v. S., 86 Ind. 431;

§ 69. 1. **Our Common Law**—on this subject, the same as on most others, should in reason be deemed to be that

Powers v. S., 87 Ind. 144; Keith v. S., 90 Ind. 89; S. v. Miller, 107 Ind. 39.

Iowa. McCauley v. U. S. Morris, 486; Sharp v. S., 2 Iowa, 454; Miller v. S., 4 Iowa, 505; S. v. Mooney, 10 Iowa, 506; S. v. Ross, 21 Iowa, 467; Decatur v. Maxwell, 26 Iowa, 398; S. v. Hutchinson, 27 Iowa, 212; S. v. Gibson, 29 Iowa, 295; S. v. Spurbeck, 44 Iowa, 667; S. v. Mewherter, 46 Iowa, 88; S. v. Wells, 46 Iowa, 662; S. v. Merrihew, 47 Iowa, 112; S. v. Canada, 48 Iowa, 448; S. v. Read, 49 Iowa, 85; S. v. Williams, 63 Iowa, 135, 18 N. W. 682; S. v. Foley, 65 Iowa, 51; S. v. Hale, 65 Iowa, 575, 21 N. W. 162; S. v. McEvoy, 68 Iowa, 355, 27 N. W. 273; S. v. Perigo, 70 Iowa, 657, 28 N. W. 452; S. v. Rohn, 140 Iowa, 640, 119 N. W. 88.

Kansas. Shawnee v. Wabaunsee, 4 Kan. 312; Emporia v. Volmer, 12 Kan. 622; In re Peyton, 12 Kan. 398; S. v. Bohan, 15 Kan. 407; S. v. Potter, 16 Kan. 80; S. v. Riddle, 20 Kan. 711; S. v. Rhea, 25 Kan. 576; S. v. Furbeck, 29 Kan. 532; S. v. Knadler, 40 Kan. 359, 19 P. 923.

Kentucky. Mickey v. C., 13 Bush, 237; Johnson v. C., 82 Ky. 116; Penman v. Com., 141 Ky. 660, 133 S. W. 540.

Louisiana. S. v. McCoy, 29 La. An. 593; S. v. Ford, 37 La. An. 443; S. v. Causey, 43 La. An. 897, 9 So. 900.

Maryland. Cromwell v. S., 12 Gill & J. 257; Stewart v. S., 1 Md. 129; S. v. Shillinger, 6 Md. 449; Raab v. S., 7 Md. 483; Davis v. S., 39 Md. 355; Allegany Commissioners v. Howard Commissioners, 57 Md. 393.

Minnesota. S. v. Gut, 13 Minn. 341; S. v. Miller, 15 Minn. 344.

Mississippi. Jenkins v. S., 30 Missis. 408; Stewart v. S., 50 Missis. 587; Rattray v. S., 61 Missis. 377; Bishop v. S., 62 Missis. 289; Williamson v. S., 64 Missis. 229, 1 So. 171; Cheatham v. S., 67 Missis. 335, 19 Am. St. 310, 7 So. 204.

Missouri. Porter v. S., 5 Mo. 538; Fanny v. S., 6 Mo. 122; S. v. Phillips, 24 Mo. 475; S. v. O'Rourke, 55 Mo. 440; S. v. Lack, 58 Mo. 501; S. v. Cox, 65 Mo. 29; S. v. Lawther, 65 Mo. 454; S. v. Daniels, 66 Mo. 192; S. v. Whitton, 68 Mo. 91; S. v. Williams, 69 Mo. 110; S. v. Guy, 69 Mo. 430; S. v. Hopper, 71 Mo. 425; S. v. Underwood, 75 Mo. 230; S. v. Bohanan, 76 Mo. 562; S. v. Burgess, 78 Mo. 234; S. v. Hayes, 81 Mo. 574 (overruling S. v. Kring, 74 Mo. 612); S. v. Matlock, 82 Mo. 455; S. v. Brownfield, 83 Mo. 448; S. v. Hayes, 88 Mo. 344; S. v. Gleason, 88 Mo. 582; S. v. Hunt, 91 Mo. 490, 3 S. W. 858; S. v. Shipman, 93 Mo. 147, 6 S. W. 97; S. v. Anderson, 96 Mo. 241, 9 S. W. 636; S. v. Haws, 98 Mo. 188, 196, 11 S. W. 574, 12 S. W. 126; S. v. Loe, 98 Mo. 609, 12 S. W. 254; S. v. Turlington, 102 Mo. 642, 11 S. W. 141; S. v. Barton, 8 Mo. App. 15; S. v. Kring, 11 Mo. App. 92.

Nebraska. Preuit v. P., 5 Neb. 377; In re Garst, 10 Neb. 78, 4 N. W. 511; McCarthy v. S., 10 Neb. 438, 6 N. W. 769; Olive v. S., 11 Neb. 1, 7 N. W. 444; Richmond v. S., 16 Neb. 388, 20 N. W. 283; Simmer-

of England as it stood when our country was settled. And such is believed to be also the true doctrine in American

man v. S., 16 Neb. 615, 21 N. W. 387; Gandy v. S., 27 Neb. 707, 746, 43 N. W. 747, 44 N. W. 108.

Nevada. S. v. Lawry, 4 Nev. 161.

New Hampshire. S. v. Albee, 61 N. H. 423, 60 Am. R. 325 (overruling S. v. Sawyer, 56 N. H. 175).

New York. P. v. Harris, 4 Denio, 150; P. v. Webb, 1 Hill, N. Y. 179; P. v. Vermilyea, 7 Cow. 108; P. v. Sammis, 6 Thomp. & C. 328, 3 Hun, 560.

North Carolina. Findley v. Erwin, 2 Murph. 244; S. v. Poll, 1 Hawks, 442, 9 Am. D. 655; S. v. Shepherd, 8 Ire. 195; S. v. Hall, 73 N. C. 134; S. v. Weddington, 103 N. C. 364, 9 S. E. 577.

Ohio. Brown v. S., 18 Ohio St. 496; S. v. McGehan, 27 Ohio St. 280; S. v. Shaw, 43 Ohio St. 324, 1 N. E. 753.

Oklahoma. Washington v. S., 2 Okla. Cr. Ap. 428, 101 P. 863.

Oregon. S. v. Hawkins, 18 Or. 476, 23 P. 475.

Pennsylvania. Com. v. Pistorius, 12 Philad. 550; Rizzolo v. Com., 126 Pa. 54, 17a, 520.

South Carolina. S. v. Coleman, 8 S. C. 237.

Tennessee. Moses v. S., 11 Humph. 232; Logston v. S., 3 Heisk. 414; Honeycutt v. S., 8 Bax. 371; Porter v. S., 3 Lea, 496; Hopkins v. S., 10 Lea, 204; Poe v. S., 10 Lea, 673.

Texas. Cotton v. S., 32 Tex. 614; Barnes v. S., 36 Tex. 639; Walker v. S., 42 Tex. 360; Anschicks v. S., 45 Tex. 148; Early v. S., 1 Tex. App. 248, 28 Am. R. 409; Buie v. S., 1 Tex. App. 452; Dupree v. S., 2 Tex. App. 613; Harrison v. S., 3 Tex. App. 558; Noland v. S., 3 Tex. App. 598; Preston v. S., 4 Tex. App. 186; Johnson v. S., 4 Tex. App. 268; Grissom v. S., 4 Tex. App. 374; McCarty v. S., 4 Tex. App. 461; Brown v. S., 6 Tex. App. 286; Valentine v. S., 6 Tex. App. 439; Daugherty v. S., 7 Tex. App. 480; Rothschild v. S., 7 Tex. App. 519; Dunn v. S., 7 Tex. App. 600; Krebs v. S., 8 Tex. App. 1; Cox v. S., 8 Tex. App. 254; Myers v. S., 8 Tex. App. 321; Grissom v. S., 8 Tex. App. 386; Cock v. S., 8 Tex. App. 659; Clampitt v. S., 9 Tex. App. 27; Kemp v. S., 11 Tex. App. 174; Bowden v. S., 12 Tex. App. 246; Ex parte Cox, 12 Tex. App. 665; Davis v. S., 19 Tex. App. 201; Martin v. S., 21 Tex. App. 1, 17 S. W. 430; Meuly v. S., 26 Tex. App. 274, 8 Am. St. 477, 9 S. W. 563; Boyett v. S., 26 Tex. App. 689, 9 S. W. 275; Thurmond v. S., 27 Tex. App. 347, 11 S. W. 451; Halsell v. S., 29 Tex. App. 22, 18 S. W. 418.

Virginia. C. v. Rolls, 2 Va. Cas. 68; C. v. Bedinger, 1 Va. Cas. 125; C. v. Wildy, 2 Va. Cas. 69; Vance v. C., 2 Va. Cas. 162; Wright v. C., 33 Grat. 880.

West Virginia. S. v. Greer, 22 W. Va. 800.

Wisconsin. S. v. Saxton, 14 Wis. 123; S. v. Rowan, 35 Wis. 303; Martin v. S., 35 Wis. 294; Bennett v. S., 57 Wis. 69, 14 N. W. 912; S. v. Hirth, 67 Wis. 368, 30 N. W. 353; S. v. Sasse, 72 Wis. 3, 38 N. W. 343; Boldt v. S., 72 Wis. 7, 38 N. W. 177; S. v. Compton, 77 Wis. 460, 46 N. W. 535; Oborn v. S., 143 Wis. 249, 126 N. W. 737.

authority;[27] though, contrary to established rules of statutory interpretation, which attach to statutes in general terms their common-law exceptions,[28] we have in one case the *dictum* that where the legislature has dircted the trial to be in the county of the offence, the court cannot order it to be in another.[29] This question is of little practical consequence, because in most of the States the change of venue is expressly authorized by statutes.[30]

2. **Name of Proceeding.**—The common name of the proceeding is in this country "change of venue," and it is sometimes met with in England and Ireland.[31] But oftener the English expression is "change of the place of trial."[32]

§ 70. In England,—this change of the place of trial, or

27. S. v. Albee, 61 N. H. 423, 60 Am. R. 325.

28. New Crim. Law, I, § 112 (2), 115 and note, 303a, note, 304, and places there cited.

29. S. v. Howard, 31 Vt. 414, 415.

30. Cases cited ante, § 68 (2); Gordon v. S., 3 Iowa, 410; S. v. Barrett, 8 Iowa, 536; Bishop v. S., 30 Ala. 34; Moses v. S., 11 Humph. 232; P. v. Harris, 4 Denio, 150; P. v. Webb, 1 Hill (N. Y.), 179; and many other cases, including those cited to the last section.

31. For example, in the Irish case of Reg. v. McEneany, 14 Cox C. C. 87.

32. To "change the venue" is, observes Lord Mansfield, "saying that the cause of action or indictment arose elsewhere," and not that the indictment is sent to another county for trial. Rex v. Harris, 1 W. Bl. 378, 379, 3 Bur. 1330, 1333. And we have similar language from American courts. P. v. Vermilyea, 7 Cow. 108, 137, 139. In which sense, there cannot be in either country a change of the venue of an indictment found by the grand jury; for neither with nor without a judicial order, can there be any such material alteration in the accusation preferred by this body. Still, the American expression, "change of venue," is not practically misleading; so there is no occasion to attempt to reform it. The ordinary common-law practice is stated in an English case, thus: "This was an indictment . . . returned by certiorari into this court; and, on a former day, a rule had been obtained, on motion of Mr. Erskine for the prosecutor, for leave to enter a suggestion on the record that a fair and impartial trial could not be had in that [Chester] county; and praying the court to award a trial in the county of Salop, that being the next English county, where the king's writ of venire runs." Rex v. St. Mary, 7 T. R. 735. And see post, § 72a.

venue, being derived from necessity,[33] is limited to cases in which without it there cannot be a fair trial;[34] and the authority is exercised with extreme caution.[35] "An indictment against a county for not repairing a bridge will be thus removed, because the jury by whom it would be tried would form part of the defendants."[36] But the fact that the gentry of a county are addicted to fox-hunting is no adequate reason for so dealing with an indictment for a conspiracy to destroy foxes.[37] Nor will a removal be made for convenience of access to the witnesses.[38]

§ 71. 1. **With Us,**—as in England, the leading rule is that the venue will be changed only when otherwise a fair trial cannot be had.[39] Thus,—

2. **The Convenience of Witnesses**—is not sufficient cause.[40] But—

3. **Prejudice in the Community,**—to a degree rendering, with reasonable certainty, a fair trial impossible, will suf-

33. Ante, § 68 (1).

34. Reg. v. Patent Eurika, &c. Co., 13 Law T. N. S. 365; Rex v. Hunt, 3 B. & Ald. 444, 2 Chit. 130.

35. Rex v. Holden, 5 B. & Ad. 347, 2 Nev. & M. 167, 27 E. C. L. 151, ante, § 68 (1), note; Rex v. Harris, 3 Bur. 1330, 1 W. Bl. 378. In a case of felony, the court refused it for alleged prejudice in the county. Rex v. Penpraze, 1 Nev. & M. 312; s. c. nom. Rex v. Penprase, 4 B. & Ad. 573, 24 E. C. L. 252. Yet a prejudice to the extent of rendering impossible a fair trial in the county will suffice. Reg. v. McEneany, 14 Cox C. C. 87. See also Attorney-General v. Smith, 2 Price, 113.

36. 1 Chit. Crim. Law, 201, referring to Rex v. Cumberland, 6 T. R. 194. And see Rex v. St. Mary, 7 T. R. 735.

37. Rex v. King, 2 Chit. 217.

38. Reg. v. Casey, 13 Cox C. C. 614.

39. P. v. Sammis, 6 Thomp. & C. 328, 3 Hun, 560; Wheeler v. S., 42 Ga. 306; Hunter v. S., 43 Ga. 483; Brinkley v. S., 54 Ga. 371; S. v. Gut, 13 Minn. 341; S. v. Miller, 15 Minn. 344; Martin v. S., 35 Wis. 294; S. v. Ford, 37 La. An. 443; S. v. Causey, 43 La. An. 897, 9 So. 900; Hargis v. Com., 135 Ky. 578, 123 S. W. 239; Black v. S., 3 Okla. Cr. App. 547, 107 P. 524.

40. P. v. Harris, 4 Denio, 150. See P. v. Baker, 3 Par. Cr. (N. Y.) 181; Reg. v. Cavendish, 2 Cox C. C. 175; P. v. Mitchell, 168 N. Y. 604, 61 N. E. 182, affirming 49 App. Div. 531, 63 N. Y. S. 522, 14 N. Y. Cr. 539.

fice;[41] yet not a prejudice which, though once existing, has subsided.[42]

4. **Adverse Combination.**—The venue was changed where one hundred citizens of the county had united in employing counsel to prosecute the prisoner.[43] But subsequently the court observed that this case "appears to have been decided without an examination of the law as it is now settled, and we should not be justified in applying it as authority in any case falling short of it in any degree." Therefore "the fact," it was held, "that thirty or forty persons, upon being solicited, have contributed small sums to defray the cost of employing a lawyer to assist the prosecuting attorney, does not show the existence of such an excitement or prejudice in the whole county upon the subject as would preclude the possibility or probability of procuring an impartial jury without difficulty, or would in any manner interfere with the impartial administration of the laws."[44]

5. **Opinion, Fact.**—The venue will not be changed for the mere belief of the party or his witnesses that he can-

41. S. v. Furbeck, 29 Kan. 532; Richmond v. S., 16 Neb. 388, 20 N. W. 282; S. v. Barton, 8 Mo. App. 15; Robertson v. Ter. (Ariz. 1910), 108 P. 217; S. v. McDonough, 104 Iowa, 6, 73 N. W. 357; Anderson v. Com. (Ky. 1909), 117 S. W. 364; Thompson v. S., 122 Ala. 12, 26 So. 141; Shepherd v. S., 36 Fla. 374, 18 So. 773; Gitchell v. P., 146 Ill. 157, 33 N. E. 757, 37 Am. St. 147; Smith v. S., 145 Ind. 176, 42 N. E. 1019; S. v. Williams, 115 Iowa, 97, 88 N. W. 194; S. v. Daugherty, 63 Kan. 473, 65 P. 695; Dilger v. Com., 88 Ky. 550, 11 Ky. L. 67, 11 S. W. 651; S. v. Dent, 41 La. Ann. 1082, 7 So. 694; P. v. Swartz, 118 Mich. 292, 76 N. W. 491; S. v. Wofford, 119 Mo. 408, 24 S. W. 1009; Renfro v. S., 42 Tex. Cr. 393, 56 S. W. 1013; Muscoe v. Com., 87 Va. 460, 12 S. E. 790; Penman v. Com., 141 Ky. 660, 133 S. W. 540; Jones v. Com. (Va. 1911), 69 S. E. 953.

42. S. v. Greer, 22 W. Va. 800; Honeycutt v. S., 8 Bax. 371; Poe v. S., 10 Lea, 673; P. v. Burke, 157 Mich. 108, 121 N. W. 282.

43. P. v. Lee, 5 Cal. 353.

44. P. v. Graham, 21 Cal. 261, 265, opinion by Norton, J. So, in South Carolina, a subscription in the district for the defendant's arrest was held not to be sufficient; for it did not necessarily "produce any improper bias on the minds of those who were subscribers, and the subscription was confined to a very few." S. v. Williams, 2 McCord, 383. And see Dupree v. S., 2 Tex. App. 613.

not have a fair trial in the county. Facts and circumstances must appear, satisfying the court.[45] Yet it is not necessary that an unsuccessful attempt should have been made to obtain an impartial jury.[46]

6. **Unfit Judge.**—Plainly, if the judge is disqualified, and the law provides no other remedy,[47] the venue will be changed; for otherwise there can be no trial.[48] And an extreme unfitness in the particular instance ought to work the same result.[49] Therefore if, before his elevation to the bench, he was the prisoner's counsel in the particular matter, the venue should be changed.[50] The statutes of some of our States have special provisions relating to the judge;[51] and either by force of them or otherwise, his partiality or prejudice is a good cause for a change of venue;[52] so, *a fortiori*, is his pecuniary interest in the event of the prosecution.[53] In some of the States, to justify the change on the ground of the prejudice of the judges, facts and rea-

45. P. v. Bodine, 7 Hill, (N. Y.), 147; P. v. Long Island Rld., 4 Par. Cr. (N. Y.) 602; S. v. Windsor, 5 Harring. (Del.), 512; S. v. Burris, 4 Harring. (Del), 582; Wormeley v. C., 10 Grat. 658; P. v. Graham, 21 Cal. 261; S. v. Bohan, 15 Kan. 407; S. v. Saxton, 14 Wis. 123; S. v. Hale, 65 Iowa, 575, 22 N. W. 682; S. v. Foley, 65 Iowa, 51, 21 N. W. 162; Territory v. Egan, 3 Dak. 119, 13 N. W. 568; Salm v. S., 89 Ala. 56, 8 So. 66; Downs v. S., 111 Md. 241, 73 A. 893.

46. P. v. Long Island Rld., supra. Still it is not error to postpone the question of a change of venue in a murder case, until an attempt is made to impanel a jury. P. v. Plummer, 9 Cal. 298. And see Moses v. S., 11 Humph. 232; Wormeley v. C., 10 Grat. 658.

47. S. v. King, 20 Fla. 19; Campbell v. Wust (Mich. 1909), 118 N. W. 987.

48. And see Archb. Crim. Pl. & Ev. (19th Eng. Ed.), 103; Rex v. Jones, 2 Har. & W. 293 there cited.

49. S. v. Matlock, 82 Mo. 455; S. v. Read, 49 Iowa, 85.

50. S. v. Gates, 20 Mo. 400.

51. S. v. Shipman, 93 Mo. 147, 6 S. W. 97; S. v. Shaw, 43 Ohio St. 324, 1 N. E. 753; S. v. Callaway, 154 Mo. 91, 55 S. W. 444; S. v. Anderson, 96 Mo. 241, 9 S. W. 636; McCarthy v. S., 10 Neb. 438, 6 N. W. 769; Packwood v. S., 24 Oreg. 261, 33 P. 674.

52. Ex parte Curtis, 3 Minn. 274; Leyner v. S., 8 Ind. 490; In re Peyton, 12 Kan. 398; Vanderkarr v. S., 51 Ind. 91; Hughes v. P., 5 Colo. 436; S. v. Read, supra. Contra, in California, P. v. Williams, 24 Cal. 31; P. v. Shuler, 28 Cal. 490; P. v. McGarvey, 56 Cal. 327. See post, § 314.

53. Jim v. S., 3 Mo. 147.

sons must be shown, as in other cases;[54] in other States, a simple affidavit suffices, and the court has no discretion to refuse the change.[55] And, as to the change in general,—

§ 72. 1. **Discretionary or not.**—There are States in which, as said in Illinois, "the statute . . . is peremptory that the court *shall* award a change when the application is made in the mode and for the causes set out in the statute."[56] And for such a cause as the disqualification of the judge, where in no other way can there be a trial,[57] this would seem in reason to be the practical rule everywhere.[58] But for the ordinary case, such as prejudice in the community, the law in most of the States submits the application to the judicial discretion of the particular judge presiding.[59] Still,—

54. Emporia v. Volmer, 12 Kan. 622; Howard v. S. (Ala. 1909), 50 So. 740; S. v. Tawney, 81 Kan. 162, 105 P. 218.

55. Manly v. S., 52 Ind. 215; Mershon v. S., 44 Ind. 598; Goldsby v. S., 18 Ind. 147. And see S. v. McEvoy, 68 Iowa, 355, 27 N. W. 273; Couch v. S., 3 Okla. Cr. App. 415, 106 P. 351.

56. Clark v. P., 1 Scam. 117; s. p. Barrows v. P., 11 Ill. 121; Brennan v. P., 15 Ill. 511; Perteet v. P., 65 Ill. 230; Rafferty v. P., 66 Ill. 118; Edwards v. S., 25 Ark. 444; Johnson v. C., 82 Ky. 116. It is different in the recorder's court for the city of Chicago. Maton v. P., 15 Ill. 536.

57. Ante, § 71.

58. And see Mickey v. C., 13 Bush, 237; S. v. Grinstead, 10 Kan. App. 78, 61 P. 976; S. v. Henning, 3 S. D. 492, 54 N. W. 536; S. v. Hawkins, 23 Wash. 289, 63 P. 258; S. v. Witherspoon, 133 S. W. 323, 231 Mo. 706.

59. Hubbard v. S., 7 Ind. 160; Griffith v. S., 12 Ind. 548; Hall v. S., 8 Ind. 439; Weeks v. S., 31 Missis. 490; Mask v. S., 32 Missis. 405; Anderson v. S., 28 Ind. 22; P. v. Congleton, 44 Cal. 92; P. v. Perdue, 49 Cal. 425; S. v. O'Rourke, 55 Mo. 440; Dupree v. S., 2 Tex. App. 613; S. v. Coleman, 8 S. C. 237; S. v. Spurbeck, 44 Iowa, 667; S. v. Mewherter, 46 Iowa, 88; Hawes v. S., 88 Ala. 37, 7 So. 302; S. v. Dent, 41 La. An. 1082, 7 So. 694; S. v. Turlington, 102 Mo. 642, 15 S. W. 141; S. v. Blount, 124 La. 202, 50 So. 12; S. v. Pomeroy, 30 Ore. 16, 46 P. 797; Gregory v. S. (Tex. Cr. App.), 37 S. W. 752; Taylor v. S., 86 Neb. 795, 126 N. W. 752; Bryant v. S., 95 Ark. 239, 129 S. W. 295; P. v. Elliott, 80 Cal. 296, 22 P. 207; S. v. Lynn, 3 Pen. (Del.) 316, 51 A. 878; Roberson v. S., 42 Fla. 223, 28 So. 424; S. v. Reed, 3 Idaho, 754, 35 P. 706; Smith v. S., 145 Ind. 176, 42 N. E. 1019; Ransbottom v. S., 144 Ind. 250, 43 N. E. 218; S. v. Moats, 108 Iowa, 13, 78 N. W. 701; S. v. Foster, 91 Iowa, 164, 59 N. W.

2. **Reviewing Discretion.**—The discretion,[60] as just said, is judicial, not personal in the individual judge.[61] The course of the courts in our States differs as to reviewing, in a higher court, a judicial discretion exercised in a lower. There are States in which the higher tribunal will rarely or never interfere in this matter of changing the venue; but the better and more common doctrine is, that the decision of the lower court will be corrected in extreme cases of abuse, and in no other.[62]

8; Smith v. Com., 108 Ky. 53, 21 Ky. L. 1470, 55 S. W. 718; S. v. Rider, 95 Mo. 474, 8 S. W. 723; S. v. Hunt, 91 Mo. 490, 3 S. W. 858; Argabright v. S., 62 Neb. 402, 87 N. W. 146; Pearce v. Ter., 11 Okla. 438, 68 P. 504; S. v. Savage, 36 Oreg. 191, 60 P. 610, 61 P. 1128; Com. v. Cleary, 148 Pa. St. 26, 23 A. 1110; Cotton v. S., 32 Tex. 614; Gallaher v. S., 40 Tex. Cr. App. 296, 50 S. W. 388.

60. Ante, § 6 (2).

61. Walker v. S., 42 Tex. 360; S. v. Ross, 21 Iowa, 467; Mershon v. S. 44 Ind 598; Dupree v. S., 2 Tex. Ap. 613; P. v. Yoakum, 53 Cal. 566.

62. S. v. Canada, 48 Iowa, 448; S. v. Williams, 63 Iowa, 135, 18 N. W. 682; S. v. Guy, 69 Mo. 430; Myers v. S., 8 Tex. Ap. 321; Bishop v. S., 62 Miss. 289; S. v. Whitton, 68 Mo. 91; Noland v. S., 3 Tex. Ap. 598; Daugherty v. S., 7 Tex. Ap. 480; Clampitt v. S., 9 Tex. Ap. 27; Grissom v. S., 8 Tex. Ap. 386; P. v. Lee, 5 Cal. 353; P. v. Stillman, 7 Cal. 117; Murphy v. S., 45 Ala. 32; Ellick v. S., 1 Swan, (Tenn.), 325; P. v. Fisher, 6 Cal. 154; Gordon v. S., 3 Iowa, 410; S. v. Barrett, 8 Iowa, 536; S. v. Nash, 7 Iowa, 347; Major v. S., 4 Sneed, 597; McCorkle v. S., 14 Ind. 39; Ex parte Banks, 28 Ala. 28; S. v. Ware, 10 Ala. 814; Kelly v. S., 52 Ala. 361; Spence v. S., 8 Blackf. 281; Fleming v. S., 11 Ind. 234; Maton v. P., 15 Ill. 536; Findley v. S., 5 Blackf. 576, 36 Am. D. 557; Sumner v. S., 5 Blackf. 579, 36 Am. D. 561; S. v. Brookshire, 2 Ala. 303; S. v. Mooney, 10 Iowa, 506; S. v. Arnold, 12 Iowa, 479; S. v. Ostrander, 18 Iowa, 435; Cotton v. S., 32 Tex. 614; Barnes v. S., 36 Tex. 639; S. v. Perigo, 70 Iowa, 657, 28 N. W. 452; Cheatham v. S., 67 Miss. 335, 19 Am. St. 310, 7 So. 204; S. v. Brownfield, 83 Mo. 448; S. v. Loe, 98 Mo. 609, 12 S. W. 254; P. v. Elliott, 80 Cal. 296, 22 P. 207; S. v. Hunt, 91 Mo. 490, 3 S. W. 858; Martin v. S., 21 Tex. Ap. 1; Carrow v. P., 113 Ill. 550; Andrews v. P., 33 Colo. 193, 79 P. 1031; Hauk v. S., 148 Ind. 238, 46 N. E. 127; White v. S., 100 Ga. 659, 28 S. E. 423; Jett v. Com., 27 Ky. L. R. 603, 85 S. W. 1179; Mount v. Com., 120 Ky. 398, 86 S. W. 707; S. v. Dwyer, 29 Nev. 421, 91 P. 305; S. v. Winchester (N. D. 1909), 122 N. W. 1111.

3. **One Change, or more.**—In some of the States, by statute, the venue can be changed but once;[63] in others, there is no such limitation.[64]

III. *Questions of Practice.*

§ 72 a. **In England,**—under the common law, the indictment is first removed by *certiorari*[65] into the court of Queen's Bench, one of the ordinary causes for the removal being the necessity for a change in the place of trial.[66] Thereupon, by leave of court, a suggestion is entered of record, and the cause sent down for trial to the new county.[67] But—

§ 73. 1. **With Us**—the removal of causes in this way is little practised.[68] Consequently the course will ordinarily depend on the terms of the particular statute, illumined in the construction by the common law.[69]

63. Aikin v. S., 35 Ala. 399; Johns v. Johns, 17 Fla. 806. And see Innerarity v. Hitchcock, 3 Stew. & P. 9; White v. Com., 27 Ky. L. R. 561, 85 S. W. 753; Aikin v. S., 35 Ala. 399; Baker v. S., 88 Wis. 140, 59 N. W. 570; Parrin v. S., 81 Wis. 135, 50 N. W. 516.

Under such a statute a motion for change of venue may be withdrawn after granting but before entry. Jett v. Com., 27 Ky. L. 603, 85 S. W. 1179. But such a statute does not prevent a second change of venue on a second indictment. S. v. Billings, 140 Mo. 193, 41 S. W. 778; Luttrell v. S., 40 Tex. Cr. 657, 51 S. W. 930.

64. S. v. Minski, 7 Iowa, 336; Decatur v. Maxwell, 26 Iowa, 398; Yater v. S., 58 Ind. 299.

65. Post, § 1377; Dir. & F., § 1081.

66. Archb. Crim. Pl. & Ev. (19th Eng. Ed.), 103; Rex v. Lewis, 1 Stra. 704; Rex v. Fawle, 2 Ld. Raym. 1452; Reg. v. Palmer, 5 Ellis & B. 1024.

67. Ante, § 69 (2), note; 1 Chit. Crim. Law, 201, 372.

68. Post, § 1377; Dir. & F., § 1081.

69. **Original papers—transcript.** In the absence of express statutory provision, and by direction of some of the statutes, not the original papers, but full transcripts of them, are to be sent to the new county; and the trial is to be on the latter. The transcript is to contain also the essential parts of the record. S. v. Foulk, 159 Kan. 775, 52 P. 864; Browning v. S., 30 Miss. 656; Williamson v. S., 64 Miss. 229, 1 So. 171; Jones v. S., 11 Ind. 357; Price v. S., 8 Gill, 295; S. v. Gibson, 29 Iowa, 295; Brister v. S., 26 Ala. 107; Williams v. S., 48 Ala. 85; Pulling v. S., 16 Ind. 458; Hurt v. S., 26 Ind. 106; Bailey v. S., 39 Ind.

2. **Which Party apply.**—In England, the applicant may be either the prosecutor or the defendant.[70] Commonly, with us, he is the defendant. Yet, in a part of our States, the change may be ordered equally on prayer of the government;[71] in others, not.[72]

438; Johnson v. S., 11 Ind. 481; Bishop v. S., 30 Ala. 34; Harrall v. S., 26 Ala. 52; Ruby v. S., 7 Mo. 206. But in some of the states the original indictment is transmitted. Sharp v. S., 2 Iowa, 454; Ammons v. S., 9 Fla. 530; Keith v. S., 90 Ind. 89; Duncan v. S., 84 Ind. 204. In Ohio, the prisoner may elect whether or not to have the original indictment sent to the new county. Shoemaker v. S., 12 Ohio, 43. In Tennessee, the jurisdiction of the court to which a criminal has been transferred by change of venue is not ousted by a failure to enter on the minutes of the court at the first term a transcript of the record of the case. Calhoun v. S., 4 Humph. 477. See also, as to the record and the transcript thereof. Ellick v. S., 1 Swan (Tenn.), 325; Adams v. S., 1 Swan (Tenn.), 466; Pleasant v. S., 15 Ark. 624; Sharp v. S., 2 Iowa, 454; Harrall v. S., 26 Ala. 52; S. v. Hicklin, 5 Pike, 190; S. v. Greenwood, 5 Port. 474; Ward v. S., 28 Ala. 53; Stone v. Robinson, 4 Eng. 469, 477; Stringer v. Jacobs, 4 Eng. 497, 50 Am. D. 221; Green v. S., 19 Ark. 178; Major v. S., 2 Sneed, 11; Brown v. S., 13 Ark. 96; Bishop v. S., 30 Ala. 34; Bramlett v. S., 31 Ala. 376; Vance v. C., 2 Va. Cas. 162; S. v. Lamon, 3 Hawks, 175; Doty v. S., 6 Blackf. 529; Doty v. S., 7 Blackf. 427; Aaron v. S., 37 Ala. 106; Scott v. S., 37 Ala. 117; Logston v. S., 3 Heisk. 414; Fawcett v. S., 71 Ind. 590; Dunn v. S., 60 Ala. 35; Ball v. S., 48 Ark. 94, 2 S. W. 462; P. v. Bush, 71 Cal. 602, 12 P. 786.

Presumed regularity. When the transmitting court is a superior one of general jurisdiction, the tribunal to which the cause is removed will presume all things to have been regularly done in the former. S. v. Williams, 3 Stew. 454, 463; Porter v. S., 5 Mo. 538. And see S. v. Williams, 69 Mo. 110; Krebs v. S., 8 Tex. Ap. 1; S. v. Daniels, 66 Mo. 192; McDonald v. S., 78 Miss. 369, 29 So. 171; S. v. Lingle, 128 Mo. 528, 31 S. W. 20; S. v. Scott, 19 N. Car. 35.

70. Rex v. Penprase, 4 B. & Ad. 573; Rex v. Hunt, 3 B. & Ald. 444; Rex v. Holden, 5 B. & Ad. 347; Rex v. St. Mary on the Hill, 7 T. R. 735; Rex v. Harris, 3 Bur. 1330; Rex v. Nottingham, 4 East, 208.

71. P. v. Webb, 1 Hill, (N. Y.), 179; P. v. Baker, 3 Par. Cr. 181; Smith v. Com., 108 Ky. 53, 21 Ky. L. 1470, 55 S. W. 718; P. v. Fuhrman, 103 Mich. 593, 61 N. W. 865; P. v. Peterson, 93 Mich. 27, 52 N. W. 1039; Gregory v. S. (Cr. App. Tex. 1896), 37 S. W. 752; Cox v. S., 8 Tex. App. 254, 34 Am. 746. And see Preston v. S., 4 Tex. App. 186.

72. Ex parte Rivers, 40 Ala. 712; post, § 76. In re Nelson, 19 S. D. 214, 102 N. W. 885.

3. **How.**—The application should set forth the grounds for it,[73] and notice must be given. Both parties have the right to be heard; usually presenting their testimony by affidavits,[74] but it may be oral.[75]

4. **Consent.**—We have authority for making the change by mutual consent.[76] But—

5. **Order of Court.**—In these and all other cases there must be an order of the court, upon which alone the change takes place.[77] It is then valid, though no sufficient cause for it was shown.[78]

6. **Changing back.**—With the defendant's consent, the venue may be changed back to the original county; for, in the words of Stone, J., it is a matter of "*privilege* secured to the prisoner, which he may waive, either before or after the order changing the venue has been entered."[79]

§ 74. 1. **When Change.**—The change is not necessarily to be made at the first term of the court.[80] But it cannot

73. Irvin v. S., 19 Fla. 872; Christ v. P., 3 Colo. 394; Hanna v. P., 86 Ill. 243; Simmerman v. S., 16 Neb. 615, 21 N. W. 387; S. v. Lawther, 65 Mo. 454; Starr v. S. (Okl. Cr. App. 1911), 115 P. 356.

74. Ex parte Chase, 43 Ala. 303; S. v. Barfield, 8 Ire. 344; S. v. Nash, 7 Iowa, 347; S. v. Floyd, 15 Mo. 349; P. v. Baker, 1 Cal. 403; S. v. Worrell, 25 Mo. 205, 207; Shifflet v. C., 14 Grat. 652; Golden v. S., 13 Mo. 417; Reed v. S., 11 Mo. 379; S. v. Byrne, 24 Mo. 151; P. v. McCauley, 1 Cal. 379; McCann v. P., 88 Ill. 103; S. v. Wells, 46 Iowa, 662; S. v. Kring, 11 Mo. Ap. 92; Porter v. S., 8 Lea, 496; Kelly v. S., 160 Ala. 48, 49 So. 535; Ward v. S., 68 Ark. 466, 60 S. W. 31; S. v. Belvel, 89 Iowa, 405, 56 N. W. 405, 27 L. R. A. 846; Blanks v. Com., 105 Ky. 41, 20 Ky. L. 1037, 48 S. W. 161; Purris v. S., 71 Miss. 706, 14 So. 268; S. v. Headrick, 140 Mo. 396, 51 S. W. 99.

75. Mask v. S., 32 Miss. 405; S. v. Bohanan, 76 Mo. 562, 564; Jackson v. S., 54 Ark. 243, 15 S. W. 607; S. v. Ford, 37 La. Ann. 443; S. v. Rodrignes, 45 La. Ann. 1050, 13 So. 802; S. v. Sheppard, 49 W. Va. 582, 39 S. E. 676; Ford v. S. (Ark. 1911), 135 S. W. 821.

76. P. v. Scates, 3 Scam. 351.

77. Manly v. S., 7 Md. 135; Ex parte Remson, 23 Ala. 25; S. v. Gleason, 88 Mo. 582. Court must act on application for change because of local prejudice. Crocker v. Justices (Mass. 1911), 94 N. E. 369.

78. P. v. Sexton, 24 Cal. 78; McCauley v. U. S. Morris, 486; S. v. Potter, 16 Kan. 80; S. v. Kindig, 55 Kan. 113, 39 P. 1028; S. v. Gleason, 88 Mo. 582; S. v. Compton, 77 Wis. 460, 46 N. W. 535. Contra, S. v. Rowan, 35 Wis. 303.

79. Paris v. S., 36 Ala. 232.

80. Bramlett v. S., 31 Ala. 376.

be after the trial begins; in other words, after the panel of twelve jurors is sworn.[81] And to move the judicial discretion, the application should be within a reasonable time.[82] It is so on general principles, made more emphatic by some of the statutes.[83]

2. **The Arraignment,**—with the plea of not guilty, may be either before or after the change of venue, or both.[84] But the better course is to require it before, and it need not be repeated after.[85]

3. **The Prosecuting Officer**—of the old county follows the case into the new,[86] or that of the new county takes it,[87] according to the diverse statutes and practice of the States.[88]

4. **Officer to execute.**—It is held in North Carolina that the sentence, in a capital case, must be executed by the sheriff of the county of the trial, not of the finding of the indictment.[89]

§ 75. **Joint Defendants.**—The venue may be changed as to one joint defendant without being so as to the rest.[90] It

81. Price v. S., supra; P. v. Cotta, 49 Cal. 166; Hunnel v. S., 86 Ind. 431; Fallin v. S., 86 Ala. 13, 5 So. 423; Gardner v. S., 25 Md. 146; S. v. Kent, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518; Rizzolo v. Com., 126 Pa. St. 54, 17 A. 520; Morris v. S., 43 Tex. Cr. Ap. 289, 65 S. W. 531.

82. S. v. Matlock, 82 Mo. 455; Haskins v. P., 14 Bradw. 198; Byers v. S., 105 Ala. 31, 16 So. 716; S. v. Adams, 81 Iowa, 593, 47 N. W. 770; S. v. Sasse, 72 Wis. 3, 38 N. W. 343. The state by introducing evidence as to facts alleged waives lack of diligence. S. v. Sharp, 233 Mo. 269, 135 S. W. 488.

83. Shackleford v. S., 79 Ala. 26; Roberts v. P., 9 Colo. 458, 13 P. 630; S. v. Compton, 77 Wis. 460, 46 N. W. 535.

84. Gardner v. P., 3 Scam. 83; Hudley v. S., 36 Ark. 237; Ex parte Cox, 12 Tex. Ap. 665, 669, 670; Myers v. S. (Tex. Cr. App.), 39 S. W. 111.

85. Vance v. C., 2 Va. Cas. 162; Price v. S., 8 Gill, 295; Davis v. S., 39 Md. 355; C. v. Pistorius, 12 Phila. 550; Goode v. S. (Tex. Cr. App. 1909), 123 S. W. 597. See as to Missouri, S. v. Goode, 132 Mo. 113, 33 S. W. 790; S. v. Renfrow, 111 Mo. 589, 20 S. W. 299.

86. S. v. Carothers, 1 Greene (Iowa), 404.

87. Gandy v. S., 27 Neb. 707, 746, 43 N. W. 747, 44 N. W. 108.

88. See S. v. Miller, 107 Ind. 39, 7 N. E. 758; Blalock v. Pillsbury, 76 Ga. 493.

89. S. v. Twiggs, Winst. i. 142.

90. S. v. Martin, 2 Ire. 101.

will operate as a severance.[91] No jurisdiction over the others is acquired in the new county, and they should be tried where indicted,[92] on the original papers which remain there,[93] the trial in the new county being on copies.[94] Still, in Illinois, after a change of venue on application of one defendant, then a trial of him on the indictment in the new county, then a sending of it back to the old county where the others were held on it, the proceeding was adjudged to be regular.[95] Where the State is the party seeking the change, and has shown its necessity as to one of several defendants, it was deemed by a single New York judge before whom the question arose, that the court should usually send all of them to the new county, though all are entitled to separate trials.[96]

IV. *Constitutional Questions.*

§ 75 a. **On Prayer of State.**—In those States whose constitutions confer on the defendant the right to be tried in the county of the crime, plainly, as only his waiver can justify a change of the venue,[96a] there can be none on application from the prosecuting power.[97] But where there is no such constitutional impediment, the English rule, permitting the prosecutor as well as defendant to be the applicant, may well prevail also with us.[98]

§ 76. 1. **Trial on Copy.**—It was held in Alabama that the section of the code which requires defendants, after a change of venue, to be tried on a certified copy of the indictment, neither impairs the right of a trial by jury, nor violates any other principle of the bill of rights.[99]

2. **Change by Statute.**—Involving the same principle as a change of venue, the Minnesota Constitution provided

91. Brown v. S., 18 Ohio St. 496.

92. S. v. Wetherford, 25 Mo. 439.

93. As to this, in other cases, see ante, § 73 (1), note.

94. John v. S., 2 Ala. 290.

95. Hunter v. P., 1 Scam. (Ill.) 453. See Cock v. S., 8 Tex. Ap. 659.

96. P. v. Baker, 3 Par. Cr. (N. Y.) 181.

96a. Ante, § 50; Bennett v. S., 57 Wis. 69, 14 N. W. 912.

97. Ante, § 73 (2).

98. Ib.; S. v. McCoy, 29 La. An. 593.

99. Bramlett v. S., 31 Ala. 376.

that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." And it was adjudged that where more counties than one constituted a judicial district, in one of which the district court was located, and a crime was committed in another, then a statute authorized the court to sit in another county in the district, and there an indictment was found by a grand jury taken from the whole district, a conviction upon it was good. Neither was it violative of the United States Constitution, forbidding the States to pass *ex post facto* laws.[1] The latter point was on error sustained by the Supreme Court of the United States; the former was not within its jurisdiction.[2]

1. S. v. Gut, 13 Minn. 341. 2. Gut v. S., 9 Wal. 35.

CHAPTER VI.

WHATEVER IS LEGALLY ESSENTIAL TO THE PUNISHMENT MUST BE ALLEGED IN THE INDICTMENT.

Consult—in connection with the third sub-title, post, §§ 95-112, 711, and various places referred to in the notes to this chapter.

§ 77. 1. **Doctrine defined.**—The doctrine of this chapter is, that every wrongful fact, with each particular modification thereof, which, in law, is required to be taken into the account in determining the punishment upon a finding of guilty, must be alleged in the indictment.[3]

2. **Fundamental.**—This doctrine is fundamental. Originating in natural reason and abstract justice, it has been adopted into the common law and confirmed by our written constitutions.

§ 78. **How Chapter divided.**—We shall consider, I. How the Doctrine is in Reason; II. How in the Adjudged Law; III. How confirmed by Constitutional Provisions.

I. How the Doctrine is in Reason.

§ 79. **Accusation essential.**—It is a truth palpable, requiring no argument, that there cannot be a punishment without an accusation. If, with no charge against one, he is imprisoned or hung, we speak of the infliction as an outrage, and no one deems it correct in language to say that he is *punished*. Now,—

§ 80. **How broad.**—What accusation? If a man is charged with acts legally punishable by imprisonment, then is hung for them, he is not punished, he is murdered. It

3. And see Riggs v. S., 104 Ind. 261, 262, 3 N. E. 886.

is no more just to take his life on an accusation of something to which the law attaches a less penalty, than to do it with no accusation. And it makes no difference that in fact he is guilty of more than is charged, or that more is proved. Though what is set down against him is a part of a larger crime, still, if the indictment is silent as to the remaining part, he can no more be punished for the whole than if no part of it had been alleged. To punish him for all, where he is not charged with all, is to punish him without accusation. Hence—

II. *How the Doctrine is in the Adjudged Law.*

§ 81. 1. **The Rule,**—which our jurisprudence has adopted from natural reason and justice, is that with which we began;[4] namely, that the indictment must allege every fact and modification of fact legally essential to the punishment to be inflicted.[5]

2. **Universal.**—This doctrine pervades the entire adjudged law of criminal procedure. It is made apparent, not alone by a single case, but by all the cases. The illustrations of it are without end; as,—

§ 82. **An Assault,**—being punishable in a particular way, if a statute enhances the punishment when a specified fact attends it, the greater punishment cannot be awarded unless the indictment charges such aggravating fact.[6] Again,—

§ 83. **Burglary**—is a felony; it was anciently punishable by death, but entitled to the benefit of clergy. Thereupon various statutes regulating the punishment were enacted; then, we read in Russell on Crimes, "the 7 & 8 Geo. 4, c.

4. Ante, § 77 (1).

5. Hobbs v. S., 44 Tex. 353, 354; S. v. Startup, 10 Vroom, 423, 432; C. v. Hayden, 150 Mass. 332, 333, 334, 23 N. E. 51; S. v. Clay, 100 Mo. 571, 583, 13 S. W. 827; post, § 98a, 102, 538, 542, 567, 578-580, 598; III, §§ 48, 63, 177, 565, 572; Stat. Crimes, §§ 166, 167, 444, 445, 464.

6. III, §§ 56, 63, 82; Dir. & F., §§ 203, 206; 1 Russ. Crimes (3d Eng. Ed.), 767, referring to Rex v. Monteth, 2 Leach, 702, 1 East P. C. 420; Browning v. S., 2 Tex. Ap. 47; Nelson v. S., 2 Tex. Ap. 227.

29, made it a capital offence in England, and the 9 Geo. 4, c. 55, in Ireland. But the 1 Vict. c. 86, repeals so much of the 7 & 8 Geo. 4, c. 29, and 9 Geo. 4, c. 55, 'as relates to the *punishment* of any person convicted of burglary;' and by § 2 enacts that 'whosoever shall burglariously break and enter into any dwelling-house, and shall assault with intent to murder any person being therein, or shall stab, cut, wound, beat, or strike any such person, shall be guilty of felony, and being convicted thereof shall suffer death.' By § 3, 'whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than ten years, or to be imprisoned for any term not exceeding three years.' " Here, the reader perceives, is a statute which, in terms, concerns merely the "punishment" of burglary. To regulate that, it divides the offence into two degrees; the lower degree consisting of common burglary, or burglary as it was known before; and the higher or capital degree consisting of this same common burglary aggravated by certain acts or a certain intent. We read on: "In an indictment on § 2 [for the aggravated or first degree of burglary], it is necessary to allege the person who was struck; and if the proof do not support the allegation, the prisoner must be acquitted of the offence in § 2, but may be convicted of a simple burglary. An indictment charged a burglary, and striking D. James, but it appeared that the person struck was Jones and not James, and it was held that the indictment must allege both the burglary and the striking, and the proof must correspond with the indictment; and, therefore, the prisoner could not be convicted of an offence within § 2, but he was convicted of a simple burglary."[7]

§ 84. General Conclusion.—We might carry this sort of illustration through the entire alphabet of crimes, but it is

7. 1 Russ. Crimes (3d Eng. Ed.), *841, 842, referring to Reg. v. Parfitt, 8 Car. & P. 288. To the like effect, see P. v. VanGaasbeck, 9 Abb. Pr. n. s. (N. Y.) 328.

needless. Specific instances appear in numerous places throughout these volumes. The result is that in every case, with no exception, the common law requires each individual thing which itself or a statute has made an element in that wrongful aggregation out of which the punishment proceeds, to be alleged in the indictment. The court, in adjudging the punishment,—or the jury, in assessing it, as is done in some of our States,—can take into its consideration nothing except what is specifically charged.[8] Still,—

§ 85. **Distinction — Discretionary Punishment.** — The reader should distinguish between the foregoing doctrine and the one stated elsewhere,[9] that when the law commits to the court a discretion as to the punishment, matter in mitigation or aggravation, to influence such discretion, need not be averred. The judge, having the right to impose a specified penalty or a less or different one, at will, does no wrong to the defendant by administering the law's mercy on evidence tendered without allegation; or, on the other hand, by listening to aggravating facts to induce him to temper the mercy with justice. He simply can impose neither a greater nor other punishment than the law has provided for the crime as charged. This is an entirely different thing from punishing one for that of which he is not accused.[10]

III. *How confirmed by Constitutional Provisions.*[11]

§ 86. 1. **In General.**—As already said,[12] the right of a person pursued for crime, to have each several thing on which his punishment is to be founded set down against

8. And see Lacy v. S., 15 Wis. 13; Koster v. P., 8 Mich. 431; S. v. Farr, 12 Rich. 24; U. S. v. Fisher, 5 McLean, 23; Rex v. Marshall, 1 Moody, 158; post, §§ 538-542, 571, 578-580; II, §§ 48, 177, 569, 572, 583, 985, and other places cited ante, § 81.

9. New Crim. Law, I, §§ 948 (1), 949; post, II, § 63a.

10. And see Brightwell v. S., 41 Ga. 482, 483.

11. Read, in connection with this subtitle, the chapter beginning post, § 95.

12. Ante, § 77.

him in allegation, is with us secured by constitutional guaranties.[13] These guaranties are various; thus,—

2. **Bill of Attainder.**—The Constitution of the United States forbids any "bill of attainder" to be passed either by the national or any State legislature.[14] It is interpreted to include as well what in the English law is meant by a bill of pains and penalties as by a bill of attainder. And the meaning is, that by no special legislation shall one be punished for any offence without conviction in the ordinary course of judicial proceedings.[15] Now, if, under the authority of a general statute, a court should sentence one to a penalty in excess of what the law provides for such acts as the indictment specifies, this indeed would not be technically a bill of attainder, therefore would not directly violate this inhibition. But it would violate the same natural right which this provision of the Constitution was introduced to protect. It would be a bill of attainder in essence, not in form,—a judicial bill of attainder, even more odious in its nature than the particular thing which this provision of the Constitution forbids.

§ 87. **Jury Trial.**—The Constitution of the United States provides, as to crimes against the general government, that the "trial shall be by jury;"[16] and there are like provisions in probably all the State constitutions, as to crimes against the State.[17] Precisely how much is meant by this we need not inquire. We have seen that it commands a trial within the county.[18] And we shall see that it forbids the jury to consist of less than twelve men.[19] The reasoning which has led to these conclusions plainly indicates that there must be also an accusation, otherwise the provision is meaningless. And an accusation is nothing unless in some way it specifies the whole wrong for which the punishment is to be inflicted. Not necessarily in minute detail, yet in

13. S. v. Startup, 10 Vroom, 423, 432.

14. Const. U. S., art. 1, §§ 9, 10.

15. Story Const., § 1344.

16. Const. U. S., art. 3, § 2; Amendm., art. 6.

17. Post, §§ 891, 892.

18. Ante, § 50.

19. Post, § 897.

some way it must be equally broad with the punishment sought. But if this were not so, still—

§ 88. 1. **Nature and Cause of Accusation.**—By the United States Constitution, "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."[20] Though this does not inhibit the States,[21] there are State constitutions, in like terms, which do.[22] But the "nature and cause" of an accusation are not stated where there is an omission of anything necessary in law to justify the punishment.[23] Again,—

2. **Grand Jury.**—We have provisions entitling persons to be tried, at least for the higher crimes, only on a finding by a grand jury. Where the trial is on information, the result is the same. There can be neither indictment nor information except in writing; which, to justify the whole punishment, must specify the whole crime. More on the subject of this chapter will appear in the one after the next.

20. Const. U. S. Amendm., art. 6.

21. Twitchell v. C., 7 Wal. 321.

22. Ante, § 76.

23. Riggs v. S., 104 Ind. 261, 262, 3 N. E. 886. "This rule requires that the indictment or information shall contain the essential elements of the crime charged, although, as said in S. v. O'Flaherty, 7 Nev. 153, 'The power of the legislature to mould and fashion the form of an indictment is plenary.'" Elliott, J.

CHAPTER VII.

NO PUNISHMENT WITHOUT COMPLIANCE WITH THE LAW'S FORMS.

§ 89. **General Doctrine.**—The law casts its protection over all persons alike. One's rights are not diminished by the mere commission of a crime. An innocent man is subject to arrest, trial, and punishment whenever an accusation in due form is made against him; to the same extent, and no greater, is the guilty man. And if both are convicted, the law will punish both; if acquitted, both will go free. Hence, before any person can be made to suffer for a crime, he must be caught and held in the exact meshes which the law has provided; or, in other words, he must be proceeded against, step by step, according to the rules ordained by the law. It is of no avail to pursue him in a way indicated by better rules; the law's rules must be applied, or the law's penalty cannot be imposed.[24] Thus,—

§ 90. **Infamy—Judgment—(Witness).**—Guilt does not produce the infamy which disqualifies the perpetrator of some crimes to be a witness. It comes only from the judgment of the court upon conviction. One erroneously adjudged guilty is infamous until the judgment is reversed.[25] So, on the other hand, an acknowledgment of guilt does not make the man infamous, excluding him from being a witness, if the law has not pursued him to the extent just stated, though such fact may be commented upon to the jury.[26] And in all respects, the reader perceives, the effect of the judgment, or of the absence of it, is the same, whether it relates to a man who is really innocent or really guilty. Again,—

§ 91. **Breaking Prison.**—If, the law's process being on a man, he is duly imprisoned, the crime of prison-breach is committed when he breaks away, being innocent, the same

24. Hatch v. S., 8 Tex. Ap. 416, 420; S. v. McCormick, 84 Me. 566, 24 Atl. 938.

25. New Crim. Law, I, § 975.

26. 2 Russ. Crimes (3d Eng. Ed.), 956.

as though he were guilty. On the other hand, however guilty one may be, if he is committed on a *mittimus* not conforming to the law, and there is no ground to hold him independently of it, a breaking from prison by him will not be a crime.[27] Here, also, the law treats the innocent and the guilty alike. Moreover,—

§ 92. **Error in Proceedings.**—A court, inquiring after the regularity of its proceedings, never asks whether or not the defendant is guilty. A guilty one, when they are irregular, has the same right to escape from the law's grasp as an innocent one. Nor, relating to them, has an innocent man any other rights which the guilty has not.

§ 93. **The Result**—is, that a person accused before a court has the same liberty to protest against the proceedings as to protest his innocence. And counsel who appear for him are equally free as to this. Our earthly laws do not, and should not, punish all sin. It is for him who has made the soul, and who knows its inner movings, its weakness, its strength, its temptations, and its power or feebleness to resist temptation, to measure out complete and final justice. The function of human law is merely to conserve the outward order of society. And a part of this order, not less essential than any other, consists in adhering to the exact methods which the law has laid down for bringing criminals to justice. A defendant who ministers to this order, however guilty he may be, becomes, by objecting step by step to every effort to bring him to justice contrary to order, a fellow-worker side by side with the faithful officers of the law. Hence,—

§ 94. **Duty of Counsel for Defence.**—It is the duty of those lawyers who defend criminal suits to familiarize themsleves with the law of the procedure.[28] And there is nothing connected with our profession more truly honorable than urging, perhaps against an incompetent prosecuting officer whom the government has no just right to em-

27. New Crim. Law, II, § 1074 (1); 1 Russ. Crimes (3d Eng. Ed.), 427, 428.

28. Dir. & F., § 40.

ploy,[29] those defences which the rules of criminal procedure furnish, even though the result should be to set at large a wretch guilty of all manner of crimes.[30]

29. Ante, § 26.

30. Post, §§ 309-311, which is unfortunately too often the outcome of criminal trials under our system of procedure by which every intendment and presumption operates in favor of the accused.

CHAPTER VIII.

CONSTITUTIONAL GUARANTIES AS TO THE ALLEGATIONS.

Consult—ante, §§ 77-88; post; § 711.

§ 95. 1. **Two Questions.**—Our constitutions protect defendants alike against undue tamperings with the findings of the grand jury, and inadequate original allegations. Hence,—

2. **How Chapter divided.**—We shall consider, I. Altering the Grand Jury's Finding; II. The Original Allegations.

I. *Altering the Grand Jury's Finding.*[31]

§ 96. 1. **Jurisdiction—Consent.**—It is familiar doctrine, often adverted to in discussions like the present, that judicial jurisdiction comes only from the law. Consent, for example, cannot give it.[32]. So that,—

2. **Stipulating Words into Indictment.**—Where, on demurrer to an indictment for the larceny of a dog and a collar, the counsel had agreed to treat the indictment as charging the dog to be tame and as being silent about the collar, this stipulation was held to be void; because otherwise, it was observed, "the defendant would not be tried upon the presentment of the grand jury, but rather upon the consent of the counsel." [33] Hence,—

31. Read, in connection with this subtitle, the chapter beginning post, § 704a.

32. Post, §§ 112, 123, 316, 893, 898. Except as to jurisdiction of the person of accused. See Ter. v. McGrath (N. M. 1911), 114 P. 364; Gibbons v. Ter. (Okl. Cr. App. 1911), 115 P. 129.

33. P. v. Campbell, 4 Par. Cr. 386, 387, Russell, J. And see post, §§ 316, 708; Newcomb v. S., 37 Miss. 383; S. v. Jones, 18 Tex. 874; Ex parte McClusky, 40 Fed. 71. But see Barlow v. S., 77 Ga. 448.

§ 96 a. **Statute.**—*A fortiori,* a statute violative of the Constitution and therefore void[34] can impart no jurisdiction. The result whereof is that,—

§ 97. 1. **Amendment permitted by Statute.**—If, in a case where the Constitution gives the defendant the right to be tried by indictment, the legislature should undertake to authorize such amendments as leave the indictment no longer the finding of the grand jury, an amendment under it would oust the jurisdiction of the court, and the cause must stop. Such is the substance of the authorities, though the doctrine is not always stated in these word.[35] But—

2. **In Reason,**—and, it is believed, not departing from the authorities, a statute may authorize any amendment which leaves so much of, and such an original indictment as the defendant is entitled to under the constitutional guaranties.[36] To illustrate,—

3. **Form—Substance.**—Mere formal allegations may be amended where a statute so authorizes, those of substance,[37] not; but there is room for diversities in the minor applications of this doctrine.[38] Thus,—

4. **The Name of the County**—may by some opinions be thus amended,[39] but others dissent.[40] So—

34. Stat. Crimes, §§ 33-37.

35. S. v. Chamberlain, 6 Nev. 257, 260; Startup v. S., 10 Vroom, 423, 432; Calvin v. S., 25 Tex. 789; P. v. Moody, 69 Cal. 184, 10 P. 392; post, § 711; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 Law Ed. 749; Patrick v. P., 132 Ill. 529, 24 N. E. 619.

36. S. v. Hanks, 39 La. An. 234, 1 So. 458; S. v. Dominique, 39 La. An. 323, 1 So. 665; S. v. Fontenette, 38 La. An. 61. Defendant cannot complain of an amendment he has obtained. S. v. Cody, 119 N. C. 908, 26 S. E. 252.

37. Sharp v. S., 6 Tex. Ap. 650; Henderson v. S., 91 Ark. 224, 120 S. W. 966; Cox v. S., 3 Okl. Cr. App. 129, 104 P. 1074.

38. Cases cited to the last two paragraphs; Hite v. S., 9 Yerg. 198; McKinley v. S., 8 Humph. 72; Cain v. S., 4 Blackf. 512; Banks v. S., 7 Tex. Ap. 591; Peebles v. S., 55 Miss. 434; C. v. Holley, 3 Gray, 458; De Olles v. S., 20 Tex. Ap. 145; S. v. Nulty, 57 Vt. 543; P. v. Roof, 24 N. Y. Cr. R. 505, 122 N. Y. S. 677.

39. S. v. Chamberlain, 6 Nev. 257; Walty v. Ward, 164 Ind. 457, 73 N. E. 889.

40. Post, § 385.

5. **The Name of the Person**—injured, and other like names, where the name is mere matter of description, and not of the substance of the offence, may on the same principles, to avoid a variance, be constitutionally amended.[41] Or if no name of the injured person is given, yet the offence is otherwise sufficiently set out, the insertion of the name may be authorized,[42] but plainly not in every case.[43] And the provision that if one indicted by a wrong name does not disclose his true one before pleading, the cause shall proceed under the name in the indictment,—if he puts forth another before pleading, such name shall be entered on the minutes of the court and the cause shall go on under it,—does not violate constitutional rights.[44] Likewise,—

§ **98.** 1. **Retrospective.**—A statute allowing this sort of amendment in the name was held to apply to an indictment already pending; and it was deemed not to be thereby rendered *ex post facto*. "It is quite too plain to admit of question," said Wheeler, J., "that the name by which the party was indicted could have nothing to do with the question of his guilt, the character of the offence, the measure or degree of criminality or punishment attached to it, or with the evidence which should be sufficient to warrant a conviction."[45]

2. **In Reason,**—any amendment which changes, prejudicially to the defendant, the meaning of any averments

41. Peebles v. S., supra; Haywood v. S., 47 Miss. 1; P. v. Herman, 45 Hun, 175; Ross v. S., 55 Ala. 177; Burroughs v. S., 17 Fla. 643; Louis v. Com., 16 Ky. L. 284; S. v. Ware, 44 La. An. 954, 11 So. 579; Sinclair v. S., 34 Tex. Cr. R. 453, 30 S. W. 1070; S. v. Casavant, 64 Vt. 405, 23 A. 636; S. v. Hanks, 39 La. An. 234, 1 So. 458; S. v. Dominique, 39 La. An. 323, 1 So. 665; Rasmussen v. S., 63 Wis. 1; P. v. Richards, 44 Hun, 278; S. v. Sterns, 28 Kan. 154; S. v. Moore, 79 Kan. 688, 100 P. 629.

42. Rough v. C., 78 Pa. 495. And see Turpin v. S., 19 Ohio St. 540.

43. McLaughlin v. S., 45 Ind. 338; S. v. Morgan, 35 La. An. 1139. See post, § 711.

44. S. v. Schricker, 29 Mo. 265; P. v. Kelly, 6 Cal. 210. And see Dukes v. S., 11 Ind. 557, 71 Am. D. 370; C. v. Holley, 3 Gray, 458; S. v. Krull, 5 Mo. Ap. 589.

45. S. v. Manning, 14 Tex. 402; S. v. Sexton, 121 Tenn. 35, 114 S. W. 494.

that cannot be constitutionally dispensed with, yet nothing short, will so subvert the indictment that it will be no longer the grand jury's finding, therefore will render it void under the Constitution, however in terms authorized by a statute. And this view accords with—may be deemed derived from —the familiar rules respecting the effect of alterations in written instruments.[46] Still, in reason, the true practical course would seem to be for the court, instead of looking upon the indictment as destroyed, to hold the amendment void, and proceed on the grand jury's original finding.[47]

II. *The Original Allegations.*

§ 98 a. Going back now to where we stood at the close of the chapter before the last,—

Doctrine defined.—Under every sort of constitution known among us, an indictment which does not substantially set down, at least in general terms, all the elments of the offense—every act or omission which the law has made essential to the punishment it imposes[48]—is void. And, besides this, under most of our constitutions the allegation must descend far enough into the particulars, and be sufficiently certain in its frame of words, to give the defendant reasonable notice of what will be produced against him.[49] Yet none of our constitutions forbid the abolishing of the commonlaw forms, if other adequate ones are provided in their stead.[50]

46. Bishop Con., §§ 745-761.

47. Ante, § 96.

48. Ante, § 77 et seq.; Williams v. S., 12 Tex. Ap. 395, 400; Hodges v. S., 12 Tex. Ap. 554; Brinster v. S., 12 Tex. Ap. 612; Young v. S., 12 Tex. Ap. 614; Insall v. S., 14 Tex. Ap. 145; Rodriguez v. S., 12 Tex. Ap. 552.

49. Consult, among other cases cited in the following sections, S. v. Startup, 10 Vroom, 423, 432; McLaughlin v. S., 45 Ind. 338; S. v. Corson, 59 Me. 137; Landringham v. S., 49 Ind. 186; S. v. Terry, 109 Mo. 601, 19 S. W. 206; post, § 101.

50. S. v. Corson, 59 Me. 137; S. v. Learned, 47 Me. 426; Morton v. P., 47 Ill. 468; Newcomb v. S., 37 Miss. 383; Rowan v. S., 30 Wis. 129, 11 Am. R. 559; S. v. O'Flaherty, 7 Nev. 153, 157; S. v. Thompson, 12 Nev. 140; S. v. Semmes (Ala. 1909), 50 So. 120; S. v. Steeves, 29 Ore. 85, 43 P. 947; Goersen v. Com., 99 Pa. St. 388; S. v. Beswick, 13 R. I. 211, 43 Am. 26; S. v. Murphy, 15 R. I. 543, 10 A. 585; S. v. McKenna, 16 R. I. 398, 17 A. 151.

§ 99. **Indictment, Information, Etc.**—The various methods of prosecution—as, by indictment, information, and the like—are explained in a subsequent chapter.[51] Where the Constitution requires, for example, an indictment, its effect is not to prohibit all legislative changes in the form.[52] But the fullness stated in the last paragraph is still required. Thus,—

§ 100. **In Liquor-selling,**—under a statute forbidding the sale "in quantities less than one quart, without first having obtained a license therefor," an added provision that the indictment need not negative the license was adjudged void,—the non-procurement of the license being deemed an element in the offence.[53] Certainly, under the common-law practice, this negative element should be alleged.[54] Yet the substance of the common law doctrine is that only a *prima facie* case need be shown in evidence.[55] And it can be reasonably argued that, where the fact of selling appears, the want of authority is matter of defence;[56] so that a *prima facie* offence is disclosed without the negative averment. And in a liquor-selling case, the Rhode Island court sustained as constitutional the provision, that "no negative allegations of any kind need be averred or proved in any complaint" on the statute.[57]

§ 100 a. *Differing Terms of Provision:*—

1. **General.**—The terms of the constitutional provision more or less vary, but there appears to be no great difference in the result to which they bring the pleader. Still it will be helpful to look at some of them. Thus,—

51. Post, § 129a et seq.

52. Ante, § 98a; S. v. Mullen, 14 La. Ann. 570; S. v. Learned, 47 Me. 426; Dent v. West Virginia, 129 U. S. 114, 9 S. Ct. 231; Caldwell v. S., 28 Tex. Ap. 566, 14 S. W. 122; P. v. Supervisors, 70 N. Y. 228, 234; Davidson v. New Orleans, 96 U. S. 97.

53. Hewitt v. S., 25 Tex. 722; S. v. Wilburn, 25 Tex. 738; S. v. Horan, 25 Tex. 271.

54. Stat. Crimes, § 1044.

55. Post, §§ 325, 519, 637; Dir. & F., § 284; Nelson v. Ter. (Okla.), 49 P. 920.

56. Stat. Crimes, §§ 1051, 1052.

57. S. v. Beswick, 13 R. I. 211, 43 Am. Dec. 26.

2. **Due Process of Law.**—Some of the State constitutions, and that of the United States in a clause which did not bind the States, provided that the governing power should not deprive any person "of life, liberty, or property without due process of law."[58] Thereupon, in 1868, the Constitution of the United States was amended so as, among other things, to make this security to the people obligatory upon the States.[59] In substance and meaning it is a confirmation of the 29th chapter of Magna Charta, whereof the words here material are "by lawful judgment of his peers, or by the law of the land." The words "law of the land" were expounded as synonymous with "due process of law," and as securing to the individual those fundamental rights of trial which previous usage had established.[60] It should be borne in mind that the Supreme Court of the United States is the ultimate interpreter of the national Constitution; so that now this provision, as interpreted by this court, is everywhere obligatory among us. Yet beyond this restraint, the States can have whatever procedure they choose.[61] At the same time, plainly enough, what is due process of law in one State might not be such in another, as viewed by the interpreting eye of the Supreme Court of the United States; for the previous State usages may have differed.[62] Now,—

3. **More particularly.**—The "process" required by this constitutional clause will more or less vary with the sub-

58. Const. U. S. v. Amendm., art. 5; Hallinger v. Davis, 146 U. S. 314, 319, 13 S. Ct. 105; Davis v. Texas, 139 U. S. 651, 11 S. Ct. 675; Thorington v. Montgomery, 147 U. S. 490, 13 S. Ct. 394.

59. Const. U. S. Amendm., art. 14, § 1.

60. 2 Inst. 50 et seq.; Sears v. Cottrell, 5 Mich. 251; Brown v. Levee Commissioners, 50 Miss. 468; Kalloch v. San Francisco Super. Ct., 56 Cal. 229; South Platte Land Co. v. Buffalo, 7 Neb. 253, 258; Murray v. Hoboken Land, etc. Co., 18 How. U. S. 272, 276; S. v. Staten, 6 Coldw. 233, 244, 245, where various definitions are collected.

61. In re Converse, 137 U. S. 624, 631, 11 S. Ct. 191; Caldwell v. Texas, 137 U. S. 692, 697, 11 S. Ct. 224; Leeper v. Texas, 139 U. S. 462, 468, 11 S. Ct. 577; Davis v. Texas, 139 U. S. 651, 11 S. Ct. 675; In re Kemmler, 136 U. S. 436, 446, 448, 10 S. Ct. 930.

62. Hurtado v. California, 110 U. S. 516, 535, 4 S. Ct. 111, 292, and other cases cited ante and post.

ject-matter to which it is applied.[63] Thus, the summary methods which immemorial usage has established for the collection of taxes,[64] for the punishment of contempts of court,[65] and other like things,[66] not adequate in prosecutions for crime, are, in these cases, "due process of law." And this clause has applications other than to judicial proceedings.[67] As applied to the latter, it secures to every person, native or alien,[68] not a jury,[69] not the incapacity to plead guilty or elect to be tried by the court,[70] but a competent tribunal, notice or appearance, accusation, proof, and a trial otherwise in recognition of fundamental principles of right.[71] Moreover, "it forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights."[72] Within and perhaps beyond which, —

63. Davidson v. New Orleans, 96 U. S. 97; Dent v. West Virginia, 129 U. S. 114, 9 S. Ct. 231.

64. Bell's Gap Rld. v. Pennsylvania, 134 U. S. 232, 239, 10 S. Ct. 533; C. v. Lehigh Valley Rld., 129 Pa. 429, 18 A. 406; Palmer v. McMahon, 133 U. S. 660, 668, 10 S. Ct. 324; P. v. Turner, 117 N. Y. 227, 22 N. E. 1022; Werner v. Galveston, 72 Tex. 22, 31, 7 S. W. 726, 12 S. W. 159; Davidson v. New Orleans, 96 U. S. 97; McMahon v. Palmer, 102 N. Y. 176, 6 N. E. 400.

65. Eilenbecker v. Plymouth District Court, 134 U. S. 31, 39, 10 S. Ct. 424; Ex parte Wall, 107 U. S. 265, 2 S. Ct. 569.

66. Murray v. Hoboken Land, etc. Co., 18 How. U. S. 272.

67. McMillen v. Anderson, 95 U. S. 37; Weimer v. Bunbury, 30 Mich. 201; In re Ziebold, 23 Fed. 791; P. v. Gillson, 109 N. Y. 389, 4 Am. St. 465, 17 N. E. 343.

68. Buford v. Speed, 11 Bush, 338; Fielden v. Illinois, 143 U. S. 452, 12 S. Ct. 528. See Fong Yue Ting v. U. S., 149 U. S. 698, 13 S. Ct. 1016.

69. Walker v. Sauvinet, 92 U. S. 90; Hausenfluck v. C., 85 Va. 702, 8 S. E. 683; post, § 891.

70. Hallinger v. Davis, 146 U. S. 314, 13 S. Ct. 105.

71. Pennoyer v. Neff, 95 U. S. 714; Zeigler v. South & North Ala. Rld., 58 Ala. 594; Kalloch v. San Francisco Super. Ct., 56 Cal. 229; Knox v. S., 9 Bax. 202; Great West Min. Co. v. Woodmas, etc. Min. Co., 12 Colo. 46, 13 Am. St. 204, 20 P. 771; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315; Stephenson v. Brunson, 83 Ala. 455, 3 So. 768; York v. Texas, 137 U. S. 15, 11 S. Ct. 9.

72. Giozza v. Tiernan, 148 U. S. 657, 662, 13 S. Ct. 721; Hallinger v. Davis, 146 U. S. 314, 321, 13 S. Ct. 105; Leeper v. Texas, 139 U. S. 462, 468, 11 S. Ct. 577; Davis v. Texas, 139 U. S. 651, 11 S. Ct. 675; Caldwell v. Texas, 137 U. S. 692, 11

4. **Accusation—Tribunal.**—It is plain in reason, not only that an accusation not comprehending every act and omission entering into the offence[73] would not be due process of law, but likewise that to render it such, words must be used which, according to the established meanings of our language, convey the idea. For example, if a statute were to provide that the word "huzza" in an indictment should, employed alone, be taken as a charge that the defendant committed a rape, an indictment in this form would not be due process of law. For such a form of charge would be contrary to immemorial usage, would blind and bewilder a defendant not read in the statutes, and would be on its face an attempted injustice. Again, if a statute were to specify some simple act which was not *malum in se,* and provide that he who committed it should be subjected to a summary trial before an inferior magistrate like a justice of the peace, and on conviction by him be stripped of all his property and sent to the State prison for life,—a proceeding contrary to natural justice, contrary to all judicial usage, and contrary to the course of things as concerns every other offence both in the same State and elsewhere,—no lawyer, no other intelligent person, could or would say that this was due process of law. These are propositions practically self-evident on their face. At the same time, we have a decision of the Supreme Court of the United States, not pronounced quite without dissent, which on its face seems, or at least is in danger of being perverted, to carry a doctrine directly contrary to every one of the points thus stated. Yet it is impossible to accept it as really so holding.[74]

S. Ct. 224; S. v. Whisner, 35 Kan. 271, 10 P. 852; S. v. Goodwill, 33 W. Va. 179, 25 Am. St. 863, 10 S. E. 285.

73. Ante, § 98a.

74. O'Neil v. Vermont, 144 U. S. 323, 12 S. Ct. 693.

1. In looking into and endeavoring to illumine this case for the help of the reader, I wish to premise a word. During more than forty years wherein I have been employed in explaining the law in books, which is a different thing from digesting the decisions, I have now and then encountered the difficulty of doing my duty and at the same time avoiding the giving of offense. There is no man living whose respect for our judges is higher than mine; for all deem them to be, what they are, human

§ 101. 1. **Fully, substantially, formally.**—A common form of the provision is, to quote from the Massachusetts

beings, and capable of oversight or error. When I bear in mind that they are such, over how wide a field their investigations necessarily extend, how great is the pressure of business upon them, and how poorly the majority of the cases before them are argued, I am amazed at the learning and the conscientious endeavor which have resulted in bringing to our books of reports so few palpably bad decisions. At the same time, no mortal can be blind to the fact that there are two classes of minds on our judicial benches. Those of the one class are always open to the truth, are conscious that they are human, and are ready to see an error they have committed, even though pointed out by a bootblack or a chimney-sweep. Those of the other class are few, yet are apt to look upon themselves as making up in importance what they lack in numbers. When they have rendered a decision, they consider the book of revelation closed. If an author travelling after them is wicked enough to open the book, and to deny that, as the theologians have it, the inspiration is "plenary," or otherwise to ask the reader to look and see, they are offended. For themselves, they will not look; no, of course. Applying the microscope to the author, they are able to discern him as a sort of mad cur, fit only to be kicked or shot. For myself, I have felt the kicking hoof of the latter class and of their sympathizers; but as to the bullet, it seems not to have yet brought death. I have made every effort to do my duty without offending this class, but in vain; so I have relinquished the attempt to avoid offense. I trust that there is no member of the Supreme Court of the United States of the latter class; I know that there are members of the former.

2. A statute in Vermont forbade any person to furnish or give away intoxicating liquor; and made the second offense punishable by a fine of twenty dollars and costs, and imprisonment for one month—the proceeding for its violation to be before a justice of the peace. Thereupon one was complained of before such justice that on a day and at a place named, he "at divers times did sell, furnish, and give away intoxicating liquor without authority, contrary," etc. The statute prescribed this form, and added that under it "every distinct act of selling" may be proved, "and the court shall impose a fine for each offense." It is perceived that both according to the ordinary meanings of the English language, and to the constructions which the courts have always put upon words like these, only one offense is here charged. So that we may interpret this accusation either as of one offense, whereupon the meaning of the statute is that the defendant may be convicted of other offenses without allegation; or we may render the statute as providing that the allegation of one offense shall, when appearing in a complaint before a magistrate for liquor selling, be adjudged to be a charge of offenses

Constitution, that no one shall be held for crime until it is "fully and plainly, substantially and formally, described to

absolutely without number, or in other words of infinite offenses. In either view, the proceeding is contrary to established usage from time immemorial, is arbitrary and unjust, and is an utter departure from the processes of law which have always been accepted as "due" to every person accused of crime, whether the crime is great or small.

3. The magistrate heard the evidence and found the defendant guilty of 457 second offenses; whereupon he condemned him to a fine and costs of $9,612.96, and to imprisonment for one month, adding that if the money should not be paid before the term of imprisonment expired, he should be further imprisoned for 28,836 days. He appealed to the County Court, where he had a trial by jury. There he was convicted of 307 second offenses, and sentenced to a fine of $6,140 and $497.96 costs; and it was added that if the money was not paid before a day named, he should be imprisoned 19,914 days, or more than 54 years, practically for life; or, as Field, J., observed in his dissenting opinion, a punishment "six times as great as any court in Vermont could have imposed for manslaughter, forgery, or perjury," p. 339. This judgment was affirmed by the Supreme Court of the State in S. v. O'Neil, 58 Vt. 140. We must bear in mind that the County Court and the Supreme Court were simply appellate tribunals, and the whole proceeding rested upon the functions of a justice of the peace sitting without a jury, who, both in Vermont and elsewhere, is utterly without authority to try a non-capital felony, or in any other case than this to inflict such a weighty punishment. Everybody knows that there never was a time, from the earliest periods of our common law to the present moment, when by the common judgment of mankind such a proceeding, before such inferior magistrate, followed by such a punishment, was "due process" in any other case of a simple misdemeanor of the *malum prohibitum* sort.

4. As this defendant was by the Constitution of the United States exempt from prosecution otherwise than by "due process of law," and as the whole proceeding against him had been without due process, he was entitled to take the case for final adjudication to the Supreme Court of the United States. The material part of the Act of Congress giving him this right is: "A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, . . . may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of

him." By interpretation, the provision extends to "every mode in which a citizen can be called to answer to any

the United States." R. S. of U. S., § 709. Here was a conviction which, in every one of its steps, from first to last, proceeded upon a statute of the State of Vermont violative, or at least upon the strongest reasons assumed to be violative, of the Constitution of the United States. It differed from the great mass of cases taken from the State courts to the Supreme Court, wherein there may be doubt whether the State court did not decide on some view of the law or fact not necessarily involving a question under the national Constitution. In this case, there was no room for doubt, or occasion for inquiry. If we strike out from the State record what these explanations show to be contrary to the Constitution of the United States, nothing of it is left. There was no possibility for the State court to render the decision it did without violating the United States Constitution; for the magistrate had no jurisdiction if the national Constitution stands; there was against the defendant no allegation, either in general terms or in the required detail, of offenses authorizing the punishment imposed; the accusation of infinite offenses, contrary to universal custom and therefore contrary to due process of law, was not that of any one offense, or of any finite number of offenses; so that, there being neither a tribunal with jurisdiction, nor a complaint in constitutional form, it was impossible that the State court should pronounce its judgment without passing upon these constitutional questions, which in the act of rendering judgment it necessarily did. And still, from the "opinion of the court," we have the following: O'Neil "did not take the point, either before the justice of the peace or the County Court, that there was any defect or want of fulness in the complaint. Any such point was waived by the failure to take it. Besides, it did not involve any Federal question. . . . The Supreme Court of Vermont decided the case before us upon a ground broad enough to maintain its judgment without considering any Federal question. No Federal question was presented for its decision, as to this case, nor was the decision of a Federal question necessary to the determination of this case, nor was any actually decided, nor does it appear that the judgment as rendered could not have been given without deciding one," pp. 327, 336.

5. Here is not a difference of opinion between the author and our Supreme Court. It is matter pertaining simply to fact; as, whether or not there is such a city as Washington. If the court overlooked the fact, and therefore decided the case wrongly, it is the same as where its attention is not directed to a governing statute, superinducing a conclusion contrary thereto; its determination is of no effect in a future cause. New Crim. Law, I, § 140, last note.

6. There are questions in this O'Neil case not within the subject of this chapter, so they are not men-

charge of crime."[75] It does not, on the one hand, "change the rules of the common law" for the indictment;[76] and, on the other hand, it renders irreversible the common law rule that one need not respond to an accusation unless "expressed with reasonable precision, directness and fullness that he may be fully prepared to meet and, if he can, to answer and repel it"[77] Still, formalities are not placed beyond change.[78] Thus,—

tioned in this note. For more regarding the allegation of infinite offenses, see post, §§ 107, 108. And see an article in 31 Am. Law Reg. & Rev. 619, where some of the views in this note are more fully stated.

7. Seeking an explantion of what seems mysterious in this case, it occurs to me that the judges who rendered the decision, becoming overweary, dropped into a sort of mental oblivion of what was before them, forgot that the statute under which was issued the writ of error required them to look upon the judgment as though proceeding from an inferior national tribunal, and assumed that the constitutional provision we are considering was in the Constitution, not of the United States, but of Vermont. One who re-reads this case will see that this theory makes all plain; I can think of no other that does. The majority opinion is silent as to the particular constitutional provision we are considering, though it speaks of others, involving other questions. And the management by counsel on behalf of O'Neil seems to have been with little apprehension of the possibilities of his case. Something is said in the opinion of the court about the waiver of rights; but we have seen that under this clause of the Constitution the Vermont magistrate was destitute of the jurisdiction he assumed; and I have no occasion to cite authorities to the familiar proposition that this sort of want of jurisdiction cannot be waived in any proceeding whatever, at any stage of it, or by any possible method. And see post, §§ 112, 123. A fortiori, if O'Neil's counsel did not, in his assignment of errors or his argument before the Supreme Court, take the point we are considering, while still the matter appeared on the face of the record in review, the court, sworn to support the Constitution of the United States, and having the violation regularly before it, was bound by that instrument to act. Without tracing this proposition further, I need only cite elucidations in the dissenting opinion of Field, J. at pp. 347, 348; and in Murray v. Charleston, 96 U. S. 432, referred to by him, and other cases which he cites, wherein the opinions were not dissenting.

75. C. v. Phillips, 16 Pick. 211, 213.

76. C. v. Davis, 11 Pick. 432, 438, opinion by Shaw, C. J.

77. C. v. Phillips, 16 Pick. 211, 213. And see C. v. Wood, 4 Gray, 11; C. v. Lang, 10 Gray, 11.

78. Ante, §§ 97-99; post, § 110.

2. **Short Allegation—Amendment—Second Offence.**—A statute having made a second offence punishable more heavily than the first, it was held not to be unconstitutional when it provided a short form of stating the first in the second indictment; adding, "and such allegation . . . may be amended without terms, and as a matter of right."[79] But an entire omission to aver the former offence, or conviction for it, cannot be authorized.[80]

3. **Variance.**—A court may be empowered to disregard any variance between a written instrument produced in evidence and the recital of it in the indictment, "provided that the identity of the instrument is evident, and the purport thereof is sufficiently described to prevent all prejudice to the defendant;" for the objection was "purely technical," not involving substantial rights.[81] Returning to substance,—

§ 102. **Murder in Two Degrees.**—Equally in Massachusetts and in the greater number of our other States, murder is by statutes divided into two degrees. The distinction is that when a specified fact attends murder, it is in the first degree; when not, it is in the second. The punishment for the first is death; for the second, imprisonment. And it is obvious that within the principles we are considering, the indictment, to authorize the death penalty, must allege such specified fact; to sustain imprisonment, it need not. All our constitutions are in terms rendering this conclusion inevitable.[82] This whole question is minutely explained in the second volume.[83] Yet the majority of our American courts, the first beginning with a blunder, and others following the lead without looking, have held that by permission of a statute such specified fact may be proved when not alleged, and the defendant hung on the evidence and verdict alone. True, there are cases, reaching in reality this conclusion, wherein the judges in words admit that

79. C. v. Holley, 3 Gray, 458.

80. C. v. Harrington, 130 Mass. 35.

81. C. v. Hall, 97 Mass. 570. See P. v. Mariposa Co., 31 Cal. 196.

82. Ante, §§ 80-88.

83. Vol. II, §§ 561-589. And see Dir. & F., § 546 and note.

assuming an indictment to set out only what constitutes murder in the second degree, the prisoner cannot lawfully be convicted of murder in the first degree, even though the statute so directs.[84] Thereupon the judges of this class proceed, some in one way, and some in another, to argue that allegations which do not embrace the special matter in terms, do it in some occult manner, about which scarcely two agree. All such decisions ought to be overruled, and they will be whenever clearer views of pleading attend the administration of criminal justice among us, and the errors respecting the doctrine of *stare decisis*[85] are corrected.

§ 103. **Keeping Liquor with Intent.**—A statute in Maine, under a constitution having the clause above recited,[86] made it punishable to keep intoxicating liquors *with the intent* to sell them unauthorized; adding, that a particular form of complaint should "be deemed sufficient." Thereupon a complaint, exactly in this form, that the defendant had in possession liquors "intended for sale," not saying by whom intended, was adjudged inadequate; for, consistently with this allegation, the forbidden intent might have been some other person's. "It is not," said Kent, J., "matter of form but matter of substance." No averment on the omission whereof it does not appear "that an offence has been committed can be mere matter of form."[87].

§ 104. 1. **Nature and Cause—(Name).**—A form of the constitutional provision, in effect not greatly differing from this one, is, as expressed in Mississippi, that "in all criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him." It "was intended," said Yerger, J., "to secure to the accused such a specific designation of the offence . . . as would enable him to make every preparation for his trial

84. Green v. C., 12 Allen, 155, 170, 171; S. v. Verrill, 54 Me. 408; S. v. Duvall, 26 Wis. 415. And see C. v. Gardner, 11 Gray, 438, 445; Didieu v. P., 4 Par. Cr. 593; S. v. Cole, (N. C. 1903), 41 S. E. 591.

85. New Crim. Law, I, §§ 93-98.

86. Ante, § 101 (1).

87. S. v. Learned, 47 Me. 426, 429, 434.

necessary to his full and complete defence." Therefore the provision in the act "to suppress trade and barter with slaves," that the name of the slave, or his owner, or the kind or quantity of the produce bought or sold, need not be alleged, was held to be unconstitutional.[88] But—

2. **In Homicide,**—the indictment may, in the same State, be rendered by statute sufficient though it omits to point out the means, manner, and circumstances of the killing.[89] And—

§ 105. **In Pennsylvania**—the like is adjudged. Though the "nature and cause of the accusation" must appear, the method of the crime and the instrument need not.[90] So—

§ 106. **In Other States,**—for example, Alabama,[91]—the same in felonious homicide has been held.[92]

§ 107. **Dealer in Liquors.**—In Vermont, under the like constitutional provision, the charge, legislatively authorized, "that the respondent became a dealer in intoxicating liquors without having license therefor, contrary to the form of the statute in such case made and provided," was adjudged adequate. Beyond which, it being judicially deemed that the statute is violated by a single sale, and each subsequent sale is a separate violation, incurring a separate penalty, it was held that all may be proved and punished under the one allegation.[93] We are here travelling back to the similar question considered under the guaranty of "due process of law."[94] The objection to the allegation is both to its indefiniteness and to its infinity. Thus,—

88. Murphy v. S., 24 Miss. 590, 594. Reaffirmed in Murphy v. S., 28 Miss. 637. And see Norris v. S., 33 Miss. 373; ante, §§ 97, 98; McLaughlin v. S., 45 Ind. 338.

89. Newcomb v. S., 37 Miss. 383. See post, §§ 101, 110.

90. Cathcart v. C., 37 Pa. 108, 114. And see S. v. Fancher, 71 Mo. 460.

91. Noles v. S., 24 Ala. 672, 693; reaffirmed, Thompson v. S., 25 Ala. 41. And see Green v. S., 41 Ala. 419; Wickham v. S., 7 Coldw. 525.

92. Wolf v. S., 19 Ohio St. 248; Rowan v. S., 30 Wis. 129, 11 Am. R. 559; post, III, § 539; Dir. & F., §§ 542-545.

93. S. v. Comstock, 27 Vt. 553, 555. Of the like sort is S. v. O'Neil, 58 Vt. 140, 2 Atl. 586. See furter, as to this sort of question. Fink v. Milwaukee, 17 Wis. 27.

94. Ante, § 100a (4), note.

§ 108. 1. **Indefiniteness.**—If the legislature can make good a criminal accusation wherein the defendant is not even informed with how many crimes he is charged, or with any one circumstance attending any one of them, but only that he "became" an unlicensed "dealer in intoxicating liquors," where each specific sale is a crime; or, to take another turn in the quicksand, that he "became" a murderer, where the killing of each man is a crime, and the State is to prove as many men killed as it can; or, to take in the sand one more turn and sink, that he "became" a criminal, leaving the prosecuting power to show at the trial wherein; then, indeed, the constitutional provision is a cable of sand, which can hold at anchor no legislative keel. This leads us to the question of—

2. **Infinity.**[95]—A charge like this which, thus interperted, permits the State on the trial to prove against the defendant as many crimes as it can, with no particularization in the indictment of any one, no description of any one, but the State in the person of its prosecuting officer stands before him and pumps and pumps for the bitter waters of guilt, and is thus permitted to pump even without a pause for all eternity, is, the reader perceives, a charge, not of finite, but of infinite, crime. A single crime, or a hundred or a thousand such, is a finite affair. Of such, there may be a bill of particulars;[96] but there can be no bill of particulars of an infinite charge. Could the prosecuting officer have for his scribes all the men and women in the world, could life be so extended as to give each one a million years in which to write, at the end of this period the eternity of the bill of particulars would only have obtained a feeble start, it could never be finished. Need an author say more to show that this is not a fit allegation under any form of constitution, or under no constitution? True, there are no authorities against it; for, until these Vermont cases arose, no pleader entertained the idea that this sort of thing was possible.

95. Ante, § 100 (4), note, par. 4, 6.

96. Post, § 643 et seq.

§ 109. **In Principle,**—the object of this sort of constitutional provision being conceded to be the protection, not of the guilty, but of the innocent,[97] only those who are conscious of having committed no crime, therefore whose knowledge of the accusation is derived solely from its words, are to be considered in giving effect to the Constitution. Now—

§ 110. **Common Law influencing.**—This is the exact standpoint from which the courts, in the successive periods of the past, have established the common law rules for the indictment. Standing beside the presumption that the defendant is innocent,[98] they have compelled from the prosecuting power such a statement of the *nature and cause* of the accusation as would impart to him, who is supposed to know nothing of it outside of the written words, reasonable information of what he is to encounter at the trial; thus enabling him to collect his proofs, and avoid the injury of a surprise. Therefore the wisdom of the past—the rules which the common law has established for the indictment—should, as respects the substance of the accusation, be the chief guide to what this constitutional provision permits or forbids. It has nothing to do with mere technicalities in the allegation. Nor does it compel the courts to shut their eyes to any clearer lights brought to them by the present age. Beyond which,—

§ 111. **Added to Common Law.**—If it is thus admitted that this constitutional provision allows departures from the common law under the command of legal principle, and consequently permits allegations which the common law would deem inadequate, it may equally require the rejection of what would satisfy the unwritten rule. For, as we have already seen,[99] there are particulars and offences as to which the common law is not sufficiently favorable to defendants. In such a case, the voice of the Constitution should prevail. Yet undoubtedly, where this instrument simply requires an indictment, not saying more, the common law form will suffice.

97. Norris v. S., 33 Miss. 373, 376.

98. Post, §§ 1049, 1103-1105.

99. Ante, § 25.

§ 112. Waiving Protection.—Since accused persons may waive constitutional rights,[1] they may doubtless, under some circumstances, waive the protection of this provision.[2] They cannot when the effect would be to create a jurisdiction which the court did not otherwise possess;[3] as, to try one wholly without accusation.[3a] But formal objections may by statute be required to be taken at an early stage of the proceeding, in the absence whereof they will be treated as waived.[3b]

1. New Crim. Law, I, §§ 996-1006; post, § 117 et seq.

2. And see Cochrane v. S., 6 Md. 400.

3. Ante, § 96; post, § 123. See ante, § 50; P. v. Herrmans, 125 N. Y. S. 143.

3a. Post, § 123; Newcomb v. S., 37 Miss. 383.

3b. Ib.; C. v. Walton, 11 Allen, 238. See post, § 117 et seq.

CHAPTER IX.

EVERY RIGHT OF THE ACCUSED MUST BE MADE PRACTICALLY AVAILABLE.

§ 113. 1. **General.**—The practice of the courts is largely moulded by the judicial hand; and always, like every other thing in the law, it yields to the inevitable,—to necessity.[4] Whence the doctrine that whenever the law confers a right, and is silent as to the procedure, it gives by implication a remedy.[5] So that—

2. **Doctrine of Chapter.**—The court will so shape its practice, and when necessary change it, as in some way to give the accused opportunity to take advantage of every conceded right. Thus,—

§ 114. **Motion to quash.**—The common law gives to the court a discretion to quash, or not, a defective indictment on motion;[6] as to which, an appellate tribunal will not revise the action of the trial curt. Thereupon it was in Massachusetts provided by a statute that any objection to an indictment for a formal defect, apparent on its face, must be taken by demurrer or a motion to quash it; and the effect was held to be to change the practice, and allow the discretion to be reviewed. "The Declaration of Rights," said Gray, J., "requires that no subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him; and we cannot infer that the legislature, by this statute, which is entitled 'An Act to promote Public Justice in Criminal Cases,' intended to oblige the accused either to leave the question whether this requirement of the Constitution has been complied with to the sudden and final determination of a single judge in the course of the trial, or else to waive his right of jury trial" by demurring.[7] Again,—

4. Ante, §§ 6, 7, and places there referred to.

5. Stat. Crimes, § 137.

6. Post, § 761.

7. C. v. McGovern, 10 Allen, 193; C. v. Walton, 11 Allen, 238. And see post, § 767; C. v. Doyle, 110 Mass. 103.

§ 115. Not divest Vested Rights.—It is the doctrine in every department of the law, that rights which have vested in individuals are unchangeable, while the remedies whereby they are enforced may be varied from time to time at the pleasure of the legislature.[8] Within which principle also, the same as within the one just stated, the absolute rights of prisoners, especially the constitutional ones, in respect of their defense, cannot be taken away. But they may be modified as to time, place, and the manner of their enforcement, yet still the substance of them must be preserved.[9]

§ 116. Conclusion.—Other illustrations will appear in various connections in the following pages. The doctrine is of the highest importance, and it pervades the entire law of criminal procedure.

8. Stat. Crimes, §§ 176-179.

9. And see C. v. Walton, 11 Allen, 238. Statute prescribing effect of evidence. S. v. Griffin, 154 N. C. 611, 70 S. E. 292.

CHAPTER X.

THE DOCTRINE OF THE WAIVER OF RIGHTS.

Consult—New Crim. Law, I, §§ 995-1007; post, § 266-271. Also Bishop Con., §§ 777-808.

§ 116 a. **How Chapter divided.**—We shall consider, I. In General of the Doctrine; II. Illustrative Applications.

I. *In General of the Doctrine.*

§ 117. **Nature, Principle, Analogies.**—In natural reason, one should not complain of a thing done with his consent. And the law, in all its departments, follows this principle. It is analogous to estoppel, or a species of it.[10] Like any other legal doctrine, the circumstances of a particular instance may compel it to give way to another,[11]—illustrations whereof will appear in the present chapter. In the law of criminal procedure,—

§ 118. **Doctrine defined.**—If, except where some counter doctrine presses with a superior force forbidding, a party has requested[12] or consented to[13] any step taken in the proceedings, or if at the time for him to object thereto he did not, he cannot afterward complain of it, however con-

10. Bishop Con., §§ 791, 796-798, 804.

11. Ib., § 994, note, 1466-1468.

12. U. S. v. Memphis, 97 U. S. 284; Wilson v. S., 18 Tex. Ap. 576; Loew v. S., 60 Wis. 559, 19 N. W. 437; Cotton v. S., 87 Ala. 75, 6 So. 396.

13. S. v. McMahon, 17 Nev. 365, 30 P. 1000; S. v. Bangor, 41 Me. 533.

trary it was to his constitutional,[14] statutory,[15] or common law rights.[16]

§ 119. **Necessity**—is the chief foundation for this doctrine. Without it, a cause could rarely be kept from miscarrying. The mind, whether of the judge or the counsel, cannot always be held taut like a bow about to send forth the arrow; and if every step in a cause were open to objection as well after verdict or sentence as before, a shrewd practitioner could ordinarily so manage that a judgment against his client might be overthrown. Even by lying by and watching, if he did nothing to mislead, he would find something amiss, to note and bring forward after the time to correct the error had passed. Should the pleadings be right, and only proper evidence be admitted, some question to a witness would appear in an objectionable form, or the judge would have dropped some word not absolutely square with the books, or omitted some explanation of law to the jury. Still,—

§ 120. 1. **Limits.**—As already said, this doctrine of the waiver of rights is at places limited by adverse doctrines,

14. Ante, § 112; Ferguson v. Landram, 5 Bush, 230, 96 Am. D. 350; Mattingly v. S., 8 Tex. Ap. 345; S. v. Wagner, 78 Mo. 644; Hancock v. S., 14 Tex. Ap. 392; S. v. Albee, 61 N. H. 423, 60 Am. R. 325; S. v. Perkins, 143 Iowa, 55, 120 N. W. 62; S. v. Vanella, 40 Mont. 326, 106 P. 364; S. v. Quinn, 56 Wash. 295, 105 P. 818.

15. Kelly v. P., 132 Ill. 363, 24 N. E. 56; P. v. McGann, 43 Hun, 55; Hopkins v. S., 5 Ga. App. 700, 63 S. E. 719; Montclair v. Amend, 76 N. J. L. 625, 72 A. 360.

16. Looper v. Bell, 1 Head, 373; Connors v. P., 50 N. Y. 240; S. v. Larger, 45 Mo. 510; Clark v. S., 4 Ind. 268; S. v. Watrous, 13 Iowa, 489; Lynch v. S., 15 Wis. 38; Croy v. S., 32 Ind. 384; S. v. Polson, 29 Iowa, 133; Ned v. S., 33 Miss. 364; S. v. Calvin, R. M. Charl. 142; Burtine v. S., 18 Ga. 534; Home Ins. Co. v. Security Ins. Co., 23 Wis. 171; S. v. Tuller, 34 Conn. 280; Ayrs v. S., 5 Coldw. 26; S. v. Waters, 62 Mo. 196; S. v. Norton, 67 Iowa, 641, 25 N. W. 842; Mixon v. S., 28 Tex. Ap. 347; C. v. Oakes, 151 Mass. 59, 23 N. E. 660; Smith v. S., 88 Ala. 73, 7 So. 52; Turner v. S., 89 Tenn. 547, 15 S. W. 838; Bulliner v. P., 95 Ill. 394; Maul v. S., 25 Tex. 166; S. v. Speaks, 95 N. C. 689; S. v. Longton, 35 Kan. 375, 11 P. 163; Jordan v. S., 165 Ala. 114, 51 So. 620; S. v. Webber, 77 N. J. L. 580, 72 A. 74; Gue v. City of Eugene, 53 Ore. 282, 100 P. 254.

interposing with superior force. The limits are not in every particular the same in our different States: thus, —

2. **Judge counselling Prisoner.**—It has been explained [17] that anciently, in England, persons indicted for treason or felony were not allowed counsel in their defense before the jury; whence it became a duty of the judges to act as counsel for them,[18] and see that nothing was done against them contrary to law.[19] So that, as a party cannot be prejudiced by any act of the court,[20] if one through the advice or oversight of the judge omitted an available objection, or relinquished a right, the error was judicial and he could take advantage of it. Thereupon, as often as a prisoner acted on this privilege, the case became a precedent that the particular right could not be waived. And when afterward counsel were accorded to prisoners, and the judges ceased to advise them, it might not be obvious whether or not the practice of denying waiver should end with its reason, in obedience to the maxim, *Cessante ratione legis, cessat ipsa lex.*[21] Some tribunals would decide a particular question of this sort in one way, some in another; the ancient and the modern law would seem in conflict; the modern cases would not harmonize with one another; chaos would pervade the law of the subject; such, indeed, we find the fact to be at the present time in our own county. Again,—

§ 121. **Prejudice with Jury.**—If we apply the maxim that the rule ceases with its reason, there may still be reasons which in some circumstances will support the old practice, in others not. In a trial before a jury, should the prisoner be asked to waive a right for their convenience, it may be a great prejudice to tell him in their hearing that he can if he chooses, and then hold him to the consequences of his choice; because, though he wished to have the benefit of the right, he might not deem it politic to offend the

17. Ante, § 14; post, § 296-298.

18. Foster, 231, 232; 2 Hawk. P. C. c. 39, § 1, 2.

19. Post, § 747; Rex v. Sidney, 9 How. St. Tr. 817, 835.

20. Broom Leg. Max. (2d Ed.), 86; Lure v. Rest, 10 Mod. 30; Jackson v. Berwick, 1 Mod. 36, 38.

21. New Crim. Law, I, § 273 (2), 275, 805 (2).

men in whose hands lay his liberty or life, by refusing. Some courts subject prisoners, at least in some circumstances, to this kind of hardship; most, yielding more to the merciful tendencies of the common law, do not.[22]

II. *Illustrative Applications.*

§ 122. **The Details**—of this doctrine appear distributed throughout these volumes, in connection with the differing questions to which it is applied. The following will render more exact this general view:—

§ 123. 1. **Waiver by Pleading.**—Ordinarily, under a rule of law or of the court,[23] a dilatory defence must be made at a designated stage of the cause; then, if the party omits to bring it forward when he should, or if he takes an advanced step instead of this one, his right thereto is ended by waiver.[24] But—

2. **Jurisdiction**—comes solely from the law, in no degree from the consent of litigants.[25] So that neither consent nor anything else can authorize a court to act in a cause outside the sphere which the law has ordained for it.[26] But

22. Post, § 998; S. v. Swayze, 30 La. Ann. 1323; S. v. Bungardner, 7 Bax. 163; S. v. Davis, 66 Mo. 684.

23. Ante, § 9.

24. Post, § 677, 744, 746, 756; Hastings v. Bolton, 1 Allen, 529; Rex v. Johnson, 1 Stra. 261; Wilmot v. Tyler, 1 Ld. Raym. 671, 1 Salk. 63; Watts v. White, 13 Cal. 321; Ex parte Winston, 52 Ala. 419; Pool v. Minge, 50 Ala. 100; Teal v. S., 22 Ga. 75, 68 Am. D. 482; S. v. Stewart, 7 W. Va. 731, 23 Am. R. 623; Flynn v. Stoughton, 5 Barb. 115; C. v. Darcey, 12 Allen, 539; Ex parte Hall, 47 Ala. 675; S. v. Drogmond, 55 Mo. 87; Henslie v. S., 3 Heisk. 202; Rex v. Warren, 1 Sid. 247, 1 Keb. 885; C. v. Dedham, 16 Mass. 141; C. v. Jackson, 1 Grant (Pa.), 262; S. v. Caulfield, 23 La. Ann. 148; Miller v. C., 1 Bibb, 404; P. v. Smith, 1 Par. Cr. 329; Stevens v. Joyal, 48 Vt. 291; Dyer v. S., 11 Lea, 509.

25. Dicks v. Hatch, 10 Iowa, 380.

26. Ante, §§ 96, 112; Dir. & F., § 1033; Eberly v. Moore, 24 How. (U. S.), 147, 158; Oakley v. Aspinwall, 3 Const. 547; Chambers v. Clearwater, 1 Abb. Ap. 341; C. v. McCready, 2 Met. (Ky.) 376; Schenley v. C., 36 Pa. 29, 78 Am. D. 359; P. v. McKay, 18 Johns. 212; Fidler v. Hall, 2 Met.. (Ky.) 461; Bureau v. Thompson, 39 Ill. 566; Scott v. Sandford, 19 How. (U. S.) 393; U. S. v. Rogers, 23 Fed. 658; Plano Manuf. Co. v. Rasey, 69 Wis. 246. See S. v. Kinney, 41 Iowa, 424; Scott v. Kelly, 22 Wal. 57; Branner v.

where the subject-matter is within the cognizance of the tribunal, and the right to take jurisdiction of it in the particular instance depends on facts *in pais*,—such as the residence of parties, and others within the like reason,—consent will, in the absence of any special circumstance forbidding, establish the required fact, the same as would the verdict of a jury; so that, in such a case, there may be waiver.[27] In like manner,—

3. **No Offence charged.**—Though formalities ordained for the ease or protection of the litigant may be waived.[28] what is of the essence of a valid judgment cannot be.[29] There can be no waiver, for example, if the declaration in a civil suit embodies no cause of action,[30] or the indictment in a criminal one charges no offence.[31] Even where a statute in terms requires the objection to the allegations to be made, if at all, at an early stage of the cause, a conviction on an indictment thus defective cannot be sustained.[32] Still,—

§ 124. 1. **Amendments.**—This doctrine does not preclude all amendments the omission whereof would leave the record too defective to sustain a judgment;[33] as,—

2. **In Pleas.**—"The rule in the courts of this country is," said Handy, J., "to allow amendments of pleadings in cases

Chapman, 11 Kan. 118; Com. v. Adams, 92 Ky. 134, 17 S. W. 276, 13 Ky. L. 440; P. v. King's County, 76 Hun, 7, 27 N. Y. S. 857; S. v. Lachman, 98 N. C. 763, 3 S. E. 635.

27. Lucking v. Denning, 1 Salk. 201, 202; Cleveland v. Welsh, 4 Mass. 591, 593; Brown v. Webber, 6 Cush. 560, 563; Brady v. Richardson, 18 Ind. 1; S. v. Regan, 67 Me. 380; Jennings v. Hankyn, Carth. 11; Nininger v. Carver Commissioners, 10 Minn. 133; Buckfield Br. Rld. v. Benson, 43 Me. 374; Mahaney v. Penman, 4 Duer, 603; Whyte v. Gibbes, 20 How. (U. S.), 541; S. v. Harper, 28 La. Ann. 35; Ledgerwood v. S., 134 Ind. 81, 33 N. E. 861; P. v. Hanifan, 98 Mich. 32, 56 N. W. 1048; S. v. Fitzgerald, 51 Minn. 534, 53 N. W. 799.

28. Ante, §§ 50, 73 (6), 75a; post, § 126.

29. Ante, §§ 79, 88, 89, 99.

30. Teal v. Walker, 111 U. S. 242, 4 S. Ct. 420.

31. Pattee v. S., 109 Ind. 545, 10 N. E. 421.

32. Ante, § 112; C. v. Doyle, 110 Mass. 103; Newcomb v. S., 37 Miss. 383. Compare with Conner v. S., 25 Ga. 515, 71 Am. D. 184; S. v. Coover, 49 Mo. 432.

33. Ante, §§ 97, 98; post, §§ 708, 711.

of misdemeanor; though, in England, they were only allowed in cases of felony."[34] The amendment can be made only when ordered by the court, acting on its judicial discretion.[35] One form of amendment consists of—

3. **Substituting Pleas.**—The permitting of one plea to be withdrawn and another to take its place is, under limitations imposed by the judicial discretion, constantly practised.[36] Probably the discretion will rarely, if ever, be exercised in aid of an attempt to rely upon a mere dilatory or formal defence.

§ 125. 1. **Record imperfect.**—It is but repetition to say that there can be no waiver of what leaves the record destitute of parts essential to a judgment.[37] Thus,—

2. **Issue.**—Though the mere formal arraignment may be waived, the plea cannot be;[38] so that a trial and verdict without plea, even where the defendant consents, will not authorize a judgment against him,—a proposition to which judicial opinion is not absolutely unanimous.[39] But,—

3. **Various Agreements—(Another Cause).** — Though not in all circumstances, yet in many, a defendant may bind himself by his agreement in a criminal cause;[40] as, "where

34. Rocco v. S., 37 Miss. 357, 366, referring to Barge v. C., 3 Pa. (P. & W.) 262, 23 Am. D. 81; Foster v. C., 8 Watts & S. 77; C. v. Goddard, 13 Mass. 455, 456.

35. Ante, § 6 (2). The amendment in the plea may be ordered at any suitable time while the pleadings are, as expressed in the English practice, in paper, and befor they are enrolled. This doctrine applies as well in criminal cases as in civil; and it is unlike that discussed in a previous chapter, concerning amendments to the indictment. Thus, **Misnomer.** Where a defendant, indicted for murder, pleaded a misnomer, and the Attorney-General replied, he was allowed afterward to amend his plea; "because the pleading was not perfected nor entered upon record. . . . And the court held that before judgment, while things were *in fieri* and in agitation, they had a power over all proceedings." Rex v. Knowles, 1 Salk. 47. And see Bonfield v. Milner, 2 Bur. 1098, 1099; C. v. Scott, 10 Grat. 749.

36. Post, §§ 747, 798, 801.

37. Ante, § 123 (3).

38. Post, § 733.

39. Post, § 733; New Crim. Law, I, § 1029a; Douglass v. S., 3 Wis. 820; Anderson v. S., 3 Pin. 367; Hoskins v. P., 84 Ill. 87; P. v. Heller, 2 Utah, 133. See Fernandez v. S., 7 Ala. 511.

40. S. v. Jones, 18 Tex. 874; S. v. Mansfield, 41 Mo. 470; Bell v. S.

a great number of people are indicted for a riot, they may move that the prosecutor should name three or four of them, and try it only against them, the rest entering into a rule, if they are found guilty, to plead guilty too; and this has often been done to prevent charges."[41] Thus, also,—

§ 126. 1. **Copy of Indictment—List of Witnesses—Of Jurors, Etc.**—Any right given by statute or otherwise to the defendant for his benefit—such as to have a copy of the indictment, or a list of the jurors, or of the witnesses against him, at a particular time or before trial—may be waived, either in words, or by omitting to apply for the thing.[42] And if, for example, the copy of the indictment furnished him is incomplete, he cannot first object after trial.[43] In like manner,—

2. **Time of Sentence.**—Where a statute requires the sentence to be postponed a given time after verdict, the defendant may waive the delay and consent to its immediate rendition.[44]

44 Ala. 393; Jackson v. C., 19 Grat. 656; Rosenbaum v. S., 33 Ala. 354; Wilson v. S., 42 Miss. 639; Nomaque v. P. (Breese), 109; Williams v. S., 12 Ohio St. 622; Wightman v. P., 67 Barb. 44; Grant v. S., 3 Tex. Ap. 1.

41. Anonymous, Holt, 635, 3 Salk. 317; s. c. nom. Reg. v. Middlemore, 6 Mod. 212.

42. New Crim. Law, I, § 997; post, § 959a; Driskill v. S., 45 Ala. 21; Miller v. S., 45 Ala. 24; S. v. Johnson (Walk. Miss.), 392; Loper v. S., 3 How. Miss. 429; Ray v. S., 1 Greene (Iowa), 316, 48 Am. D. 379; S. v. Vester, 23 La. Ann. 620; S. v. Axiom, 23 La. Ann. 621; Record v. S., 36 Tex. 521; S. v. Fuller, 14 La. Ann. 667; Dawson v. S., 29 Ark. 116; Reg. v. Frost, 2 Moody, 140, 9 Car. & P. 162; McCall v. U. S., 1 Dak. 320; Peterson v. S., 45 Wis. 535; Johnson v. S., 43 Ark. 391; S. v. Russell, 33 La. Ann. 135; Barrett v. S., 9 Tex. Ap. 33; Barnett v. S., 83 Ala. 40, 3 So. 612; McCoy v. S., 46 Ark. 141; P. v. Goldenson, 76 Cal. 328, 19 P. 161; Hammond v. S., 3 Wash. 171, 28 P. 334; S. v. Finn, 43 La. Ann. 895, 9 So. 498; Powell v. S., 74 Ark. 355, 85 S. W. 781; S. v. Williford, 111 Mo. App. 668, 86 S. W. 570; Stock v. S., 2 Okla. Cr. Ap. 697, 105 P. 320; S. v. Quinn, 56 Wash. 295, 105 P. 818.

43. C. v. Betton, 5 Cush. 427.

44. P. v. Robinson, 46 Cal. 94.

CHAPTER XI.

THE PROOFS MUST COVER THE ENTIRE ACCUSATION.

Consult—as part of this chapter, post, §§ 1052-1055.

§ 127. 1. **Doctrine defined.**—As the allegation against a defendant must cover every particular essential to the punishment to follow conviction,[45] so likewise must the proofs.[46] Thus,—

2. **Two Criminal Acts.**—A crime which consists of two distinct acts, both duly charged in the indictment, is not established by proof of one only.[47] But if it is constituted by either one of two acts, the proof of one will suffice.[48] And—

3. **Only the Crime.**—In all cases, only so much of the allegation need be proved as constitutes the crime to be punished.[49] But no harm will ordinarily[50] come from a surplus of proofs.[51]

§ 128. **Inadequate.**—If the proofs come short at any part of the case, the court will as of law order an acquittal.[52]

§ 129. 1. **Evidence and Proof distinguished.**—Not necessarily must witnesses testify directly to each several element of the crime; for one thing may be inferred from another, and evidence and proof are distinguishable. Sometimes the law raises the presumption, on a particular thing appearing, that another exists; sometimes the proof is by record. But—

2. **The Details**—will appear in other connections.

45. Ante, § 77 et seq.

46. Ihrig v. S., 40 Ind. 422; Moore v. S., 33 Ga. 225; Bell v. S., 46 Ind. 453; S. v. Hebel, 72 Ind. 361; Simpson v. S., 59 Ala. 1.

47. S. v. McConkey, 20 Iowa, 574.

48. C. v. Finnegan, 109 Mass. 363; Rex v. Hunt, 2 Camp. 583; S. v. Givens, 5 Ala. 747; New Crim. Law, I, § 799; S. v. Sherman, 81 Kan. 874, 107 P. 33.

49. Rex v. Hunt, supra; C. v. Woodward, 102 Mass. 155; U. S. v. Vickery, 1 Har. & J. 427; S. v. Bangor, 30 Me. 341; P. v. Newton, 11 Cal. Ap. 762, 106 P. 247.

50. See New Crim. Law, I, §§ 804-815.

51. New Crim. Law, I, § 791; P. v. Rouse, 2 Mich. (N. P.), 209; Skipworth v. S., 8 Tex. Ap. 135.

52. C. v. Merrill, 14 Gray, 415, 77 Am. D. 336; S. v. Daubert, 42 Mo. 242.

CHAPTER XII.

THE SEVERAL METHODS OF PROSECUTION.

§ 129 a. **How Chapter divided.**—There are four methods of prosecution, I. By Indictment; II. By Presentment; III. By Information; IV. By Complaint before a Magistrate.

I. *By Indictment.*

§ 130. **When.**—From the earliest times in England and with us, the leading method for the prosecution of other than petty offences has been by indictment. And the rule of the unwritten law is that whatever is a crime, as explained in "New Criminal Law," [53] and whatever its magnitude, whether treason, felony, or misdemeanor, and whether made such by the common law or by a statute, is, in the absence of anything in the written law changing the rule, indictable. It is immaterial to this proposition whether the punishment is death, or imprisonment, or otherwise corporal, or a fine. So that in ordinary legal language, to say that a thing is indictable, and to say that it is criminally punishable, are equivalents.[54] But occasionally we find a statute taking away the indictment for what is

53. Defined New Crim. Law, I, § 32; fuller, Ib., §§ 204-815.

54. Stat. Crimes, § 250c; 2 Hawk. P. C. c. 25, §§ 3, 4; Co. Lit. 126b; Archb. Crim. Pl. & Ev. 1; 1 Steph. Hist. Crim. Law, 293; 1 Chit. Crim. Law, 162; Rex v. Friend, Russ. & Ry. 20; Rex v. Davis, Say. 163; S. v. Anderson, 11 Vroom, 224; S. v. Cartee, 48 Mo. 481; S. v. Cadle, 19 Ark. 613; P. v. Goshen, etc. Turnpike, 11 Wend. 597; S. v. Sinnott, 15 Neb. 472, 19 N. W. 613.

otherwise a crime.[55] And if what was not punishable at the common law is made so by a statute which provides a different procedure, the latter only is permissible; unless, according to some opinions,[56] the prohibition and the method of proceeding are set down in different sections.[57] This sort of question is more minutely considered in "Statutory Crimes."[58]

§ 131. 1. **Defined.**—An indictment is a written accusation, against a specified person or persons, of some crime the elements whereof it states, made on oath by not less than twelve of a grand jury, to be carried into court and there become of record.[59]

2. **Bill.**—Before the writing is signed by the grand jury or their foreman, it is called a bill; the words "A true bill," indorsed on it and signed, transmute it into an indictment.[60]

55. Williams v. S., 4 Mo. 480; Glasscock v. S., 159 Ala. 90, 48 So. 700; P. v. Lewis, 9 Col. Ap. 279, 98 P. 1078; Sponberg v. S. (Tex. Cr. Ap. 1910), 131 S. W. 541.

56. Stat. Crimes, § 251.

57. 2 Hawk., P. C. c. 25, § 4; 2 Hale, P, C. 171; Journey v. S., 1 Mo. 428; Rex v. Wright, 1 Bur. 543; Reg. v. Buchanan, 8 Q. B. 883.

58. Stat. Crimes, §§ 250-253.

59. Coke's definition is: "An accusation found by an inquest of twelve or more upon their oath." Co. Lit. 126b. Blackstone's: "A written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury." 4 Bl. Com. 302. And see 2 Hale, P. C. 152, 153; Wolf v. S., 19 Ohio St. 248, 255. Some would add that the grand jury must be of the county in which the offense was committed. See next note; ante, § 50. But doubtless the finding of any grand jury acting under due authority would be rightly termed an indictment; so this particular is incidental, therefore not a necessary element in the definition. For other definitions see S. v. Terry, 109 Mo. 601, 19 S. W. 206; In re Durant, 60 Vt. 176, 12 A. 650; S. v. Hewlett, 124 Ala. 471, 27 So. 18; Ex parte Harte, 11 C. C. A. 165, 63 Fed. 249, 28 L. R. A. 801; S. v. Schnelle, 24 W. Va. 767; Williams v. S., 12 Tex. Ap. 395; Vanvickle v. S., 22 Tex. Ap. 625, 2 S. W. 642; Ex parte Show (Okla. Cr. Ap. 1910), 113 P. 1062.

60. Hawkins puts it, in a form more accurate in England at the time he wrote than now in this country, thus: "An indictment is an accusation, at the suit of the king, by the oaths of twelve men of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county, determinable by the court into which they are returned,

3. **Presentment, distinguished—Inquisition.**—In the language of the older books, "when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a formed indictment, it is called a presentment. And when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an inquisition."[61] The inquisition is believed not to be known in our States; and the presentment, we shall presently see, is not much used. Nor, with us, would the circumstance that the grand jury heard the evidence before the charge was reduced to writing prevent its being termed an indictment.[62]

§ 132. 1. **An Old Form**—of the indictment is:—

"Essex, to wit. The jurors for our lord the king upon their oath present, that C. D., late of the parish of West Ham, in the county of Essex, laborer, on the thirty-first day of December, in the sixth year of the reign of our Sovereign Lord George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the faith, with force and arms, at the parish of West Ham aforesaid, in the county of Essex aforesaid, did, &c. [setting forth the particular offence; and, at the commencement of every fresh sentence, stating, 'and the jurors aforesaid, on their oath aforesaid, do further present, that,' &c.; [63] and concluding, if it be for an offence at common law, injurious to a particular individual, as well as to the community, as follows]: to the great scandal, infamy, disgrace, and damage of the said A. B., to the evil and pernicious example of all others, in contempt of our said lord the king and his laws, and against the peace of our said lord the king, his crown, and dignity."[64]

and finding a bill brought before them to be true." Hawk., P. C. b. 2, c. 25, § 1; Rex v. Brown, 1 Salk. 376.

61. Hawk., P. C. ut sup. Special presentment treated as indictment. Barlow v. S., 127 Ga. 58, 56 S. E. 131.

62. Post, §§ 696, 861, 870.

63. Counts distinguished. Chitty says this clause is proper, and does not necessarily indicate a new count; referring to Rex v. Haynes, 4 M. & S. 214, 221. It was in this case held that these words alone did not render what went after them a new count; there being, in what went before, no such complete allegations and conclusion as are essential in a finished count. "The whole forms," said Le Blanc, J., "but one count containing two introductions to one grievance only." Still I cannot but think that though such is the law, and many forms in the books are so, it is neater to use these words, whose proper office it is to introduce a new count, only for this their legitimate purpose. The counts will be explained post, § 421 et seq.

64. 1 Chit. Crim. Law, 176.

2. **Surplusage—("FurtherPresent").**—This form contains much of what is useless or worse,—to be pointed out in proper connections in this Criminal Law Series.[65] For example, the words "the jurors aforesaid on their oath aforesaid do further present," which are proper for introducing a new count,[66] but do not necessarily mean that a new count begins with them,[67] should in practice be employed only for the one purpose.[68]

§ 133. 1. **More Modern.**—The following is suggestive of what, with us, would be generally deemed appropriate and sufficient:—

"The State of ———.[69]

"——— county.[70]

"At a court of ———, holden at ———, in and for said county, the jurors of said State on their oath present,[71] that Richard Martin, of, &c., laborer,[72] on the thirty-first day of December, in the year of our Lord one thousand eight hundred and sixty-five, at ———, in said county of ———,[73] did, &c. ['to the common nuisance,' &c., in some special cases [74]], against the peace of said State,[75] and contrary to the form of the statute in such case made and provided."[76]

2. **Second Count.**—If a further count is to be added, the pleader, beginning a new paragraph, will say:—

"And the jurors aforesaid, on their oath aforesaid, do further present, that," etc.

§ 134. **The Particular Offence**—must be stated according to its nature and special facts, therefore for it there can be no general form.

§ 135. **What Indictment show.**—The indictment must disclose on its face that it was found by competent author-

65. Post, §§ 500-504; Dir. & F., §§ 43-49. See various other places, and particularly throughout Dir. & F.

66. Post, §§ 133, 429; Dir. & F., § 64.

67. Rex v. Haynes, 4 M. & S. 214, 221.

68. Dir. & F., § 115, note.

69. Post, § 383.

70. Post, §§ 377, 379, 381, 385.

71. Post, §§ 655-668; Dir. & F., §§ 53-64.

72. Dir. & F., §§ 74-77.

73. Dir. & F., §§ 80-90.

74. Post, II, §§ 862-864; Stat. Crimes, § 977; Dir. & F., § 775.

75. Post, §§ 429, 648-652a, 772, note; Dir. & F., §§ 66, 67.

76. Post, §§ 429, 595-607; Stat. Crimes, §§ 164, 167; Dir. & F., §§ 66, 67.

ity, in accordance with the law; and that one mentioned therein did, within the jurisdiction of the indictors, such and such acts, at a time stated; which acts, so done, constitute what the court can see, as of law, to be a crime justifying the punishment to be inflicted. How specific the allegations must be is matter of professional skill and science, not to be compressed into a single paragraph; to be acquired by study, by observation, and by practice.

II. *By Presentment.*

§ 136. **Compared with Indictment.**—Chitty[77] states that a presentment "differs only from an indictment in being taken in the first instance by the grand jury, of some offence within their own knowledge, and into which it is their duty to inquire."[78] Now, the knowledge of the grand jury is just as good a ground for an indictment as the testimony of witnesses.[79] So that in our States, where the prosecuting officer commonly draws the indictment by direction of the grand jury after they have heard the evidence, there is in reason no great room to distinguish between an indictment and a presentment.[80]

§ 137. 1. **Whether Indictment on Presentment.**—Chitty proceeds to state that the presentment is "regarded merely as instructions for an indictment," which the proper officer draws on its being delivered into court.[81] With us, this proceeding is too little used to have established any general American practice. In reason, our indictment being in English instead of Latin as formerly in England, and written on paper instead of parchment, we have no occasion for the old translation by a clerk from the vernacular into a dead language, or the substitution of parchment for

77. 1 Chit. Crim. Law, 162.

78. 4 Bl. Com. 301; Bac. Abr. Indictment, A; 2 Inst. 739; Com. Dig. Indictment, B; Burn Just. Presentment; Collins v. S., 13 Fla. 651, 663.

79. Post, § 864.

80. Ante, § 131; post, § 860. And see C. v. Green, 126 Pa. 531, 12 Am. St. 894.

81. 4 Bl. Com. 301; Burn Just. Presentment; Bac. Abr. Indictment; Com. Dig. Indictment, B; 2 Inst. 739; Cro. C. C. 32; Dick. Just. Presentment.

paper. Under the old law, Coke's observation was pertinent, that "every indictment is a presentment, but every presentment is not an indictment;"[81a] yet now, with us, a presentment, when full, is in substance an indictment.

2. **General Presentment.**—Sometimes our grand juries make a sort of general presentment of evils and evil things, to call public attention to them, yet not as instructions for any specific indictments. No one could be called to answer to such a presentment.

§ 138. 1. **Practice differing.**—In States wherein the specific presentment is used, the practice is better understood by the local profession than it can be by another who writes a general treatise. There appear to be no two of these States in which it is precisely identical.

2. **In Virginia**—it seems to be the course (the author does not speak positively on any such question of local practice) for the prosecuting officer, on the presentment being brought in, to draw an information thereon, and for the prisoner to be tried on it, in connection with the presentment;[82] though there may be a trial on the presentment without an information.[83]

3. **In Tennessee,**—no indictment is drawn on the presentment, but the trial is on the latter, "which is in form an indictment; except that, instead of being signed by the At-

81a. 2 Inst. 731.

82. Bishop v. C., 13 Grat. 785; C. v. Jones, 2 Grat. 555.

83. C. v. Towles, 5 Leigh, 743; C. v. Maddox, 2 Va. Cas. 19. See also, as to the presentment in Virginia, C. v. Collins, 9 Leigh, 666; Word v. C., 3 Leigh, 743; Myers v. C., 2 Va. Cas. 160. There appears to have grown up in Virginia, under legislative and judicial sanction, a practice which gives to the presentment an effect greater than in England, and different. In some cases of misdemeanor, a summons may issue and the party be tried on the presentment, without indictment, and without information filed. Or the presentment may be made the basis of an information to be tendered by the prosecuting officer, when the trial will be had on the latter; and though the presentment is too informal to sustain the prosecution directly, it may sustain the information, and the information sustain the prosecution. See C. v. Christian, 7 Grat. 631. Presentment not used in New York. In re Osborne, 125 N. Y. S. 313, 68 Misc. 597.

torney-General and foreman of the grand jury, it is signed by the grand jurors individually."[84]

§ 139. 1. **In Georgia,**—no action is required of the grand jury on an indictment which has been framed on their presentment; such being understood to be the English practice.[85] Therefore,—

2. **Statute of Limitations.**—If, in Georgia, there is a presentment before the prosecution is barred by a statute of limitations, the prosecution may go on though the indictment is not drawn and filed until afterward; for, said McDonald, J., "the presentment is the indictment."[86]

§ 140. **Waiving Presentment.**—In one case it was said to be the American practice to take no notice of presentments on which the prosecuting officer does not institute proceedings. And where, after a presentment, this officer draws a bill of indictment which the grand jury returns as true, yet on which at a subsequent term he enters a *nolle prosequi,* the prosecution appears to be ended.[87]

III. *By Information.*[88]

§ 141. 1. **Civil and Criminal.**—The information is employed both in various civil and *quasi* civil suits[89] and in criminal.

84. Garret v. S., 9 Yerg. 389, 390; s. p. Smith v. S., 1 Humph, 396. For further explanations of the Tennessee practice, see S. v. Baker, 4 Humph. 12; S. v. Love, 4 Humph. 255; Glenn v. S., 1 Swan (Tenn.), 19; S. v. Tilly, 8 Bax. 381.

85. Nunn v. S., 1 Kelly, 243.

86. Brock v. S., 22 Ga. 98, 100. See also, as to the presentment in Georgia, Hatcher v. S., 23 Ga. 307; Ivey v. S., 23 Ga. 576; Ex parte Chauvin, T. U. P. Charl. 14; Hawkins v. S., 54 Ga. 653.

87. U. S. v. Hill, 1 Brock. 156. And see further, as to presentments, S. v. Mitchell, 1 Bay, 267; S. v. Cain, 1 Hawks, 352; Rex. v. Winter, 13 East, 258; Collins v. S., 13 Fla. 651; Overshiner v. C., 2 B. Monr. 344; Com. v. Green, 126 Pa. 531, 12 Am. St. 894, 17 Atl. 878.

88. Consult, as a part of this sub-title, post, §§ 712-715.

89. 1 Tidd P. (8th Ed.), 649; Reg. v. Hughes, Law Rep, 1 P. C. 81; Reg. v. Blagden, 10 Mod. 296; U. S. v. Lyman, 1 Mason, 482; Ward v. Tyler, 1 Nott & McC. 22; C. v. Hite, 6 Leigh, 588, 29 Am. D. 226; S. v. Garcia, 38 Tex. 543.

2. **Defined.**—It sometimes denotes the complaint before an inferior tribunal, to be spoken of in our next sub-title;[90] but commonly, in a connection like the present, a criminal information is an accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath.[91]

3. **Whence—In what Cases.**—The proceeding by criminal information comes from the common law without the aid of statutes.[92] It is widely permissible; the rule appearing to be that it is a concurrent remedy with the indictment for all misdemeanors except misprision of treason, which is a misdemeanor,[93] but not for treason or any felony.[94] And there are practical reasons which render it unavailable in some cases of misdemeanor, where the indictment can be maintained.[95]

90. And see post, § 717. Conclusions of law and facts within judicial notice need not be alleged. Rasberry v. S., 4 Okla. 613, 103 Pac. 865.

91. 2 Hawk., P. C. c. 26, § 4; Wilkes v. Rex, 4 Bro. P. C. 360; Bac. Abr. "Information;" post, §§ 712-715. See C. v. Messenger, 4 Mass. 462; Cole Inf. 1; Canard v. S., 2 Okla. Cr. App. 505, 103 P. 737; Snapp v. S., 2 Okla. Cr. App. 515, 103 P. 553; P. v. Mayer, 84 N. Y. S. 71, 4 Misc. 289; Hewitt v. Newburger, 20 N. Y. S. 913, 66 Hun, 239; P. v. Wyatt, 80 N. Y. S. 198, 39 Misc. 456; S. v. Barnes, 3 N. D. 131, 54 N. W. 541; P. v. Sponsler, 1 Dak. 289, 46 N. W. 459; Ex parte Show, 4 Okla. Cr. Ap. 416, 113 P. 1062. An information as basis for warrant must be verified by county attorney or some person having knowledge. De Graff v. S., 2 Okla. Cr. Ap. 519 and by 34 Utah, 166, 96 Pac. committal by magistrate. S. v. Jensen, 1085.

92. Prynn's Case, 5 Mod. 459; s. c. nom. Rex v. Berchet, 1 Show. 106; S. v. Hewlett, 124 Ala. 471, 27 So. 18; S. v. Dover, 9 N. H. 468, 470.

93. 2 Hawk., P. C. c. 26, § 3. But query. In Rex v. Cowper, Skin. 637, an information was sustained for an attempt to commit a statutory treason.

94. Cole Inf. 9; 2 Hawk., P. C., p. 356 et seq.; Bac. Abr. "Information;" Archb. Crim. Pl. & Ev. (13th Ed.), 95; 2 Hawk., P. C. c. 26, §§ 1-3; Rex v. Berchet, and Prynn's Case, supra; Troy's Case, 1 Mod. 5; C. v. Waterborough, 5 Mass. 257, 259; C. v. Barrett, 9 Leigh, 665; Canard v. S., 2 Okla. Cr. Ap. 505, 103 Pac. 737; In re McNaught, 1 Okla. Cr. 528, 99 P. 24; Mitchell v. S., 126 Ga. 84, 54 S. E. 931; Wood v. S., 3 Okla. Cr. Ap. 553, 107 P. 937.

95. These reasons are such as the following. In England, when the application is by a private person (see post, § 143), the court will

§ 142. **By Attorney or Solicitor General.**—The right to make the information is, by the English law as it stood when this country was settled, in the Attorney-General, who acts upon his official discretion without the interference of the court;[96] or, during a vacancy of this office, in the Solicitor-General.[97] The court will not even give the officer leave to file the information; for he does it of right.[98] "But," says Cole, "although the Attorney-General *may*, if he think fit, exhibit a criminal information *ex officio* for any misdemeanor whatever; yet in practice he seldom does so, except when directed by the House of Lords, or the House of Commons, or the Lords of the Treasury; or the commissioners of some public department, for example, the Excise, Customs, Stamps and Taxes, War Office, Admiralty, etc.; or where the case is of a very serious nature."[99] Also,—

§ 143. **By Master of Crown Office—(How prompted).**—At the common law, "the king's coroner and attorney in the Court of King's Bench, usually called the master of the crown office," may file a criminal information.[1] He does it only on the prompting of some private prosecutor; or, as Blackstone expresses it, "at the relation of some private person or common informer;"[2] but the information is silent as to the prompting.[3] In early times, this

not always grant it, though an indictment would lie. New Crim. Law, I, §§ 246 (1), 256 (3), 266 (1), 688 (3). Ex parte Crawshay, 8 Cox C. C. 356; Rex v. Peach, 1 Bur. 548; Reg. v. Marshall, 4 Ellis & B. 475; Rex v. Smithson, 4 B. & Ad. 861, 1 Nev. & M. 775; Anonymous, Lofft, 155; Rex v. Morgan, 1 Doug. 314. But this sort of information is not known—or not generally—in our practice. Post, §§ 143, 144. Prosecuting officers with us will grant informations more freely than the English attorney-general, and more so in some States than in others (see post, § 144), yet their discretion will present some practical obstacles. P. v. Russell, 245 Ill. 268, 91 N. E. 1075; Sperheck v. P., 139 Ill. Ap. 96.

96. Rex v. Philipps, 3 Bur. 1564; Rex v. Plymouth, 4 Bur. 2089.

97. Wilkes v. Rex, 4 Bro. P. C. 360; Rex v. Wilkes, 4 Bur. 2527, 2553, 2577.

98. Rex v. Plymouth, 4 Bur 2089.

99. Cole Inf. 9, 10.

1. 4 Bl. Com. 308.

2. Ib.

3. Cole Inf. 269 et seq.

officer proceeded, says Lord Mansfield, "upon any application as a matter of course."[4] The consequence of which was that the public process was sometimes perverted to private ends; to remedy which evil, it was in 1692 enacted by 4 & 5 Will. & M. c. 18, that this information should be used only by leave of court, and on the prosecutor's giving security to the party proceeded against for costs.[5] It may be doubtful how far this statute is common law with us;[6] but, it seems, we have no such officer, so that the law of England respecting this kind of criminal informations cannot be of practical force here. Hence,—

§ 144. **In our States,**—the criminal information should be deemed to be such, and such only, as, in England, is presented by the Attorney or Solicitor-General. This part of the English common law has plainly become ours. And as, with us, the powers which in England are exercised by the Attorney-General and the Solicitor-General are largely distributed among our district attorneys, whose office does not exist in England, they would seem to be entitled, under our common law, to prosecute by information, as a right adhering to their office, and without leave of court.[7] And such is the doctrine extensively if not universally acted upon; though, in some of the States, it is more or less aided by statutes.[8] In most of our States, the information is not much used; but in a few of them, particularly of late, it

4. Rex v. Robinson, 1 W. Bl. 541, 542; Rex v. Jolliffe, 4 T. R. 285, 290.

5. See Rex v. Brook, 2 T. R. 190.

6. Kilty mentions it among the statutes found applicable in Maryland. Kilty Rep. Stats. 180. Parsons, J., says it is not in force in Alabama, S. v. Moore, 19 Ala. 514, 520. See C. v. Varner, 2 Va. Cas. 62; C. v. Ayres, 6 Grat. 668.

7. Compare with post, § 1388. S. v. Fox, 83 Conn. 286, 76 A. 302; S. v. Petrich, 122 La. 127, 47 So. 438; S. v. Doasburg, 124 La. 289, 50 So. 162; S. v. JuNun, 53 Ore. 1, 98 P. 513. And without taking testimony, S. v. Hoffman, 70 Mo. Ap. 271.

8. Respublica v. Griffiths, 2 Dall. 112; S. v. Ross, 14 La. Ann. 364; Cronkhite v. S., 11 Ind. 307; Snodgrass v. S., 13 Ind. 292; Whitney v. S., 10 Ind. 404; McJunkins v. S., 10 Ind. 140; Washburn v. P., 10 Mich. 372; C. v. Waterborough, 5 Mass. 257, 259; C. v. Barrett, 9 Leigh, 665; C. v. Cheney, 6 Mass. 347; S. v. Dover, 9 N. H. 468; Semon v. S., 158 Ind. 55, 62 N. E. 625.

has become the common, though not the exclusive, method of prosecution.[9] In Connecticut, from an early period, all criminal prosecutions are carried on by it, presented either by the attorney for the State or by a single grand juror, except where the punishment is death or imprisonment for life.[10] But—

§ 145. 1. **Constitutional Obstructions,**—in some of our localities, render it incompetent even for legislation to authorize this information in felonies and capital cases.[11] Some of the State constitutions require "indictment or information." [12]

2. **"Due Process."**—The provision for "due process of law," explained in a preceding chapter,[13] does not in any case preclude the proceeding by information, when authorized by a statute[14] or a State constitution.[15]

3. **In United States Courts.**—By the Constitution of the United States, in a provision which does not bind the States,[16] "no person shall be held to answer for a capital

9. It is so in Michigan; as to which, see Campbell's "Political History of Michigan," 562, 563. As to California, see Hurtado v. California, 110 U. S. 516, 4 S. W. 111, 292; P. v. Campbell, 59 Cal. 243; P. v. Krueger (Ill. 1908), 86 N. E. 617.

10. 2 Swift Dig. 370; Romero v. S., 60 Conn. 92, 22 Atl. 496.

11. Campbell Hist. Mich. ut sup.; S. v. Jackson, 21 La. Ann. 574; Beardell v. S., 4 Tex. Ap. 631; Monroe v. Meur, 35 La. Ann. 1192; Jones v. S., 18 Neb. 401, 25 N. W. 527. And see S. v. Anderson, 11 Vroom, 224. Indictment not required for a misdemeanor. Ford v. Moss, 124 Ky. 288, 98 S. W. 1015; Ex parte Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801; Smith v. S. (Ala. 1910), 51 So. 602; P. v. Russell, 245 Ill. 268, 91 N. E. 1075. See S. v. Langworthy (Ore. 1910), 106; Eakin v. S. (Okla. Cr. Ap. 1911), 114 P. 270.

12. S. v. Keim, 79 Mo. 515; S. v. Briscoe, 80 Mo. 643; Garza v. S., 11 Tex. Ap. 410; S. v. Russell, 88 Mo. 648; Ex parte McNaught, 23 Okla. 285, 100 P. 27; Wood v. S., 3 Okla. Cr. 553, 107 P. 937.

13. Ante, § 100a.

14. Ante, §§ 50, 88 (2); Rowan v. S., 30 Wis. 129, 11 Am. R. 559. See S. v. Cowan, 29 Mo. 330; Portland v. Bangor, 65 Me. 120, 20 Am. R. 681.

15. Hurtado v. California, 110 U. S. 516. Compare S. v. JuNun, 53 Ore. 1, 98 Pac. 513, affirmed in 97 Pac. 96. Contra. Lewis v. S., 160 Ala. 121, 49 So. 755.

16. Ante, § 88; Noles v. S., 24 Ala. 672; S. v. Keyes, 8 Vt. 57, 63, 30 Am. D. 450; S. v. Jackson, 21 La. Ann. 574; Twitchell v. C., 7

or otherwise infamous crime unless on a presentment or indictment of a grand jury, except,'' etc.

4. **''Infamous.''**—What crimes are infamous, as disqualifying a witness,[18] or a juror,[19] we saw in another connection. Within this constitutional provision, a crime punishable in a State prison or penitentiary, either with or without hard labor, is infamous.[20] But—

5. **Those Misdemeanors**—against the United States, which are not within this constitutional inhibition, may be prosecuted by information.[21]

§ 146. **Form.**—The mere formal parts of the information differ somewhat in our States. In England they are:—

"Of Michaelmas Term in the fifth year of Queen Victoria:

"Cambridgeshire, to wit: Be it remembered, that Sir Frederick Pollock, Knight, Attorney-General of our present sovereign lady the Queen, who for our said lady the Queen in this behalf prosecuteth, in his own proper person cometh into the court of our said lady the Queen before the Queen herself at Westminster, on, &c., and for our said lady the Queen giveth the court here to understand, that, &c. [proceeding to set out the offence, in as

Wal. 321; Jane v. C., 3 Met. Ky. 18, 22; S. v. Boswell, 104 Ind. 541, 4 N. E. 675; P. v. Botkin, 9 Cal. App. 244, 98 P. 861; S. v. Newton, 74 Kan. 561, 87 P. 757; Compare contra Bonaparte v. S. (Okla. 1911), 112 P. 917.

17. Const. U. S. Amendm., art. 5; Reed v. S., 2 Okla. Cr. App. 589, 103 P. 1042; Hayes v. S., 3 Okla. Cr. App. 1, 103 P. 1061.

18. New Crim. Law, I, §§ 972, 974, 976 (2); S. v. Clark, 141 Ia. 297, 119 N. W. 719.

19. Ib., § 977 (1).

20. U. S. v. DeWalt, 128 U. S. 393, 9 S. Ct. 111; Mackin v. U. S., 117 U. S. 348, 6 S. Ct. 777; Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935; Butler v. Wentworth, 84 Me. 25, 24 Atl. 456; U. S. v. Johannesen, 35 Fed. 411. Some other cases on this question are U. S. v. Field, 21 Blatch. 330; Territory v. Farnsworth, 5 Mont. 303, 5 P. 869; U. S. v. Baugh, 4 Hughes, 501; In re Fry, 3 Mackey, 135; U. S. v. Reilley, 10 Saw. 134; U. S. v. Butler, 4 Hughes, 512; S. v. Nolan, 15 R. I. 529, 10 Atl. 481; U. S. v. Tod, 25 Fed. 815; U. S. v. Mann, 1 Gallis, 3; Ex parte Brown, 40 Fed. 81; U. S. v. Burgess, 3 McCrary, 278; U. S. v. Maxwell, 3 Dil. 275, 279; In re Wilson, 18 Fed. 33; U. S. v. Wynn, 3 McCrary, 266; U. S. v. Loudon, 176 Fed. 976; Nation v. District of Columbia, 34 App. D. C. 453.

21. U. S. v. Waller, 1 Saw. 701. And see S. v. Cowan, 29 Mo. 330; Bank of Vincennes v. S., 1 Blackf. 267; S. v. Benson, 38 Ind. 60; Com. v. Kawson, 183 Mass. 491, 67 N. E. 605; Gordon v. S., 102 Ga. 673, 29 S. E. 444; U. S. v. Camden Iron Works, 150 Fed. 214.

many counts as the pleader chooses, precisely as in an indictment; and omitting nothing which the indictment should contain, even to the conclusion. A new count is introduced as follows: 'And the said Attorney-General of our said lady the Queen, on behalf of our said lady the Queen, further gives the court here to understand and be informed, that,' &c. The information then closes, thus]: Whereupon the said Attorney-General of our said lady the Queen, for our said lady the Queen, prays the consideration of the court here in the premises, and that due process of law may be awarded against him the said S. L. in this behalf, to make him answer to our said lady the Queen touching and concerning the premises aforesaid." [22]

§ 147. **Like Indictment.**—Excepting, therefore, mere formal parts, at the beginning and close, it is precisely like an indictment.[23]

IV. *By Complaint before a Magistrate.*[24]

§ 148. **Distinguished.**—This trial before an inferior magistrate should not be confounded with bindings over of suspected persons to a higher court.[25]

§ 149. 1. **Justices of Peace.**—We shall see more of them further on.[26] "Sheriffs," says Coke, "were great officers and ministers of justice long before the Conquest; but jus-

22. Cole Inf. 262-269. For the form in Michigan, see either of the following cases: Washburn v. P., 10 Mich. 372; Evans v. P., 12 Mich. 28; Wattles v. P., 13 Mich. 446; Rice v. P., 15 Mich. 9. The following, from 2 Swift Dig. (new Ed.), 791, is the form in Connecticut:

"To the Hon. —— Court for the County of ——, now in session.

"A. B. of ——, Esquire, attorney for the State in and for said county, here in court informs, that, etc. [setting out the offense as in an indictment], and that the said E. F. is now at large. Wherefore the said attorney prays that a bench warrant may issue against the said E. F., that he may be arrested and brought before this court to answer to this information, and be dealt with according to law.

"I., Attorney."

23. S. v. Williams, 8 Tex. 255; P. v. Higgins, 15 Ill. 110; S. v. Miles, 4 Ind. 577; S. v. Elliott, 41 Tex. 224; Strader v. S., 92 Ind. 376, 377; S. v. Beebe, 83 Ind. 171; Avery v. P., 11 Bradw. 332; S. v. Bennett, 102 Mo. 356. See post, § 712; Walt v. P., 46 Colo. 136, 104 P. 89; S. v. Fox, 83 Conn. 286, 76 A. 302; S. v. Martin (Ore. 1909), 103 Pac. 737.

24. Consult, in connection with this sub-title, the two chapters beginning respectively post, § 224c and § 716.

25. Ante, § 32; post, § 247 et seq.

26. Post, §§ 174-179.

tices of peace had not their being until almost three hundred years after; namely, in the first year of Edward III."[27] Their powers were from time to time varied by statutes; as judges, their first criminal jurisdiction was in sessions, where were employed the indictment and jury trial; afterward authority was given them, in some special cases, to proceed out of sessions, without a jury, on view or on complaint.[28] Still,—

2. **In this Country,**—when the colonies were settled, this branch of the English law had become considerably developed. But the statutes in our States have so minutely defined the functions of these officers as to leave questions of their common law authority of little consequence.[29]

§ 150. Convictions on View,—in some special cases, were early authorized in England. The proceeding is, for the magistrate to go in person to the place where an offence is being committed, and, seeing it, to enter on his record a conviction of the offenders, with neither complaint nor testimony. Paley says that this proceeding was first limited to two offences, supposed to require immediate action; namely, forcible entries and riots; the former, regulated by 15 Rich. 2, c. 2; the latter, by 13 Hen. 4, c. 7. As to the latter it was directed that if the rioters had departed before the arrival of the justices, and so the view could not be had, the inquiry should be by jury.[30]

§ 151. With Us,—at the present day, there is no need for this extremely summary jurisdiction. Still our books contain a few cases relating to it,[31] none, which the author has seen, of a recent date. In most of our States, plainly this jurisdiction does not now exist.

§ 152. Convictions on Complaint or Information—are among our most familiar proceedings. Therein some person, official or non-official, complains before the magistrate that another has committed a petty offence described;

27. 3 Co. Pref.

28. See, for a summary of all, Paley Convict. Int.

29. Post, § 176.

30. Paley Con. 6.

31. Holcomb v. Cornish, 8 Conn. 375; C. v. Eyre, 1 S. & R. 347.

whereupon a warrant issues for his arrest. On his being brought before this or some other magistrate, evidence is heard, and without a jury he is convicted or discharged as the case requires.[82]

§ 153. **Beneficial.**—For obvious reasons, this course, as to petty offences, is highly beneficial and just.

§ 154. **Course of Discussion.**—We are now prepared to enter on the minuter examination of particular topics.

82. Post, § 716 et seq.

BOOK III.

PREPARATORY AND AUXILIARY TO INDICTMENT AND TRIAL.

CHAPTER XIII.

THE ARREST.

Consult—New Crim. Law, places referred to under title Arrest in Index; post, next chapter; also chapters beginning §§ 224c, 240, 247.

§ 155. **How Chapter divided.**—We shall consider, I. How make the Arrest, and the Rights of those arrested and arresting; II. Without Warrant, by Unofficial Persons; III. Without Warrant, by Officers, IV. Private Persons assisting the Officer in Arrest; V. The Arrest under Warrant; VI. The Breaking of Doors in making Arrest; VII. Executing the Warrant, when, and who exempt; VIII. Arrests of Persons and Goods under Search-warrants; IX. Seizing Goods in other Arrests of the Person; X. The Disposal of the Arrested Person and Goods.

I. *How make the Arrest, and the Right of those arrested and arresting.*

§ 156. **Arrest defined.**—An arrest is the taking into custody of a person, or person and goods, under some lawful command or authority.[33]

§ 157. **What Restraint and how.**—Mere words spoken to one are not an arrest of him;[34] there must be something physical, though it is enough if the party arresting touch the other, "even with the end of his finger."[35] So, it suffices for the officer to come into a room, lock the door, and tell a person there that he arrests him, "for he is in custody of the officer."[36] And one is arrested who submits to the officer on being told his purpose to arrest him.[37] "But if instead of going with the bailiff he had gone or fled from him, it could be no arrest unless the bailiff laid hold of him."[38]

§ 158. **Disclose Purpose.**—Simply to restrain a man who is neither told nor suspects the reason is not to arrest him. The one arresting, whether an officer or private person,

33. And see the Law of Arrests, (London), 1742, p. 1; Baltimore & O. R. Co. v. Strube, 111 Mo. 119, 73 A. 697; U. S. v. Benner, 24 Fed. Cas. 1084; Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212, 23 L. R. A. 632; Ex parte Sherwood, 29 Tex. App. 334, 15 S. W. 812; Hogan v. Strophlet, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809.

34. Hill v. Taylor, 50 Mich. 549, 15 N. W. 899; Petit v. Colmery, 4 Penn. (Del.) 55 A. 344.

35. Genner v. Sparks, 6 Mod. 173, 1 Salk. 79. And see Whithead v. Keyes, 3 Allen, 495, 501; Petit v. Colmery, 4 Penn. (Del.) 266, 55 A. 344.

36. Lord Hardwicke, C. J., in Williams v. Jones, Cas. temp. Hardw. 298, 301. And see Grainger v. Hill, 4 Bing. (N. C.), 212, 5 Scott, 561; S. v. Buxton, 102 N. C. 129, 8 S. E. 774; McLeer v. Good, 216 Pa. 473, 65 A. 934.

37. Emery v. Chesley, 18 N. H. 198; Mowry v. Chase, 100 Mass. 79, 85; Reg. v. Nugent, 11 Cox C. C. 64; New Crim. Law, II, § 26 (1).

38. 1 Salk. (6th Ed.), 79, note, referring to Horner v. Battyn, Bull. N. P. 62; s. p.; Hussen v. Lucas, 1 Car. & P. 153; George v. Radford, 3 Car. & P. 464, Moody & M. 244; Berry v. Adamson, 6 B. & C. 528, 2 Car. & P. 503; Searls v. Viets, 2 Thomp. & C. 224; Mowry v. Chase, 100 Mass. 79, 85; Strout v. Gooch, 8 Greenl. 126.

should make known his purpose;[39] but the particular surroundings may render it plain; if they do, resistance will be illegal, the same as though it were stated in words.[40] This sort of question is more fully considered further on.[41]

§ 159. 1. **Yielding.**—It is always one's duty to submit to a lawful arrest, and forcible resistance is a crime.[42] Still,—

2. **Violence.**—The arresting person should use no unnecessary violence;[43] but simply employ such force in degree and kind as the circumstances of the particular case, which practically are found widely to differ, render reasonable.[44] Yet when an officer acts in good faith, a force which afterwards seems excessive will be leniently regarded. And though it may be his protection that his act was prompted by his best judgment,[45] he must not needlessly kill the other, instead of arresting him, even though committing a felony.[46] Still,—

3. **Felony and Misdemeanor distinguished.**—If one committing a felony flies from an officer attempting his arrest, and will not stop on being commanded, the latter to enforce compliance may shoot him; but if the offence is a mis-

39. Mackalley's Case, 9 Co. 65a; Brooks v. C., 61 Pa. 352, 100 Am. D. 645; S. v. Bryant, 65 N. C. 327; Com. v. West (Ky. 1908), 113 S. W. 76.

40. Rex v. Davis, 7 Car. & P. 785; Rex v. Howarth, 1 Moody, 207. And see Rex v. Payne, 1 Moody, 378; Pew's Case, Cro. Car. 183, 537, 538; 9 Co. 65b; John v. S., 3 Head, 127, 147.

41. See post, §§ 189-193.

42. New Crim. Law, II, § 39.

43. S. v. Mahon, 3 Harring. (Del.) 568; Giroux v. S., 40 Tex. 97; Rhodes v. King, 52 Ala. 272; Suell v. Derricott, 161 Ala. 259, 49 So. 895; S. v. Mills, 6 Penn. (Del.) 497, 69 A. 841.

44. S. v. Dierberger, 96 Mo. 666, 9 Am. St. 380, 10 S. W. 168; Beaverts v. S., 4 Tex. Ap. 175; Skidmore v. S., 2 Tex. Ap. 20; P. v. Carlton, 115 N. Y. 618, 22 N. E. 257; Robison v. U. S. (Okla. 1910), 111 P. 984; McAllister v. S., 7 Ga. App. 541, 67 S. E. 221 (shooting by officer of one in flight); S. v. Mills, 6 Penn. (Del.) 497, 69 A. 841; S. v. Coleman, 186 Mo. 151, 84 S. W. 978.

45. S. v. McNinch, 90 N. C. 695; S. v. Pugh, 101 N. C. 737, 9 Am. St. 44, 7 N. E. 757.

46. Reg. v. Murphy, 1 Crawf. & Dix. C. C. 20; Gardiner v. Thibodeau, 14 La. Ann. 732; York v. C., 82 Ky. 360; Jackson v. S., 66 Miss. 89, 14 Am. St. 542, 5 So. 690.

demeanor, he has no right to take this exterme measure,[47] though the fugitive may escape. Yet—

§ 160. **Arrest resisted.**—Alike in felony and misdemeanor,[48] if the person resists the arresting officer instead of flying, all force necessary to overcome him may be employed;[49] thereupon, if the officer still pressing forward is obliged to take life as in self-defence, he will be justified.[50] Therefore,—

47. Reg. v. Dadson, 2 Den. C. C. 35; New Crim. Law, II, §§ 647-649; Middleton v. Holmes, 3 Port. 424; Carr v. S., 43 Ark. 99; S. v. O'Niel, 1 Houst. Crim. 468; Jackson v. S., supra; Croom v. S., 85 Ga. 725, 11 S. E. 1035, 21 Am. St. 79; Holmes v. S., 5 Ga. Ap. 166, 62 S. E. 176; Miers v. S., 34 Tex. Cr. 161, 29 S. W. 1074, 53 Am. St. 705; S. v. Smith (Iowa 1904), 101 N. W. 110; S. v. Phillips, 119 Iowa, 652, 94 N. W. 229. See also S. v. Roane, 2 Dev. 58; Dill v. S., 25 Ala. 15; Brady v. Price, 19 Tex. 285.

48. S. v. McNally, 87 Mo. 644.

49. Mesmer v. C., 26 Grat. 976; Brooks v. C., 61 Pa. 352; Golden v. S., 1 S. C. 292; Burdett v. Colman, 14 East, 163, 190; Petit v. Colmary, 4 Penn. (Del.) 266, 55 A. 344.

50. Morton v. Bradley, 30 Ala. 683; S. v. Roane, 2 Dev. 58; Arthur v. Wells, 2 Mill, 314; S. v. Mahon, 3 Harring. (Del.) 568; S. v. Garrett, Winst. 1, 144, 84 Am. D. 359; Brooks v. C., 61 Pa. 352, 100 Am. D. 645; Lander v. Miles, 3 Or. 35; U. S. v. Rice, 1 Hughes, 560; S. v. Dierberger, 96 Mo. 666, 9 Am. St. 380, 10 S. W. 168; Adams v. S., 72 Ga. 85; S. v. Bland, 97 N. C. 438, 2 S. E. 460; Clements v. S., 50 Ala. 117. And see S. v. Fee, 19 Wis. 562. East says: "Where persons having authority to arrest, or imprison, or otherwise to advance or execute the public justice of the kingdom, and using the proper means for that purpose, are resisted in so doing, and the party resisting is killed in the struggle, such homicide is justifiable. And on the other hand, if the party having such authority, and executing it properly, happen to be killed, it will be murder in all who take a part in such resistance; this being considered by the law as one of the strongest indications of malice, an outrage of the highest enormity, committed in defiance of public justice, against those who are under its special protection." 1 East, P. C. 295. And see New Crim. Law, II, § 647; Creighton v. C., 83 Ky. 142, 4 Am. St. 143. But see Conraddy v. P., 5 Par. Cr. 234; Tiner v. S., 44 Tex. 128; James v. S., 44 Tex. 314. In Brown v. Weaver, 76 Miss. 7, 23 So. 388, 42 L. R. A. 423, 71 Am. St. 512, the views of the author as to the right to kill one who is resisting arrest for misdemeanor are criticized by the court and condemned as an inaccurate statement of the law. The court in that case in 1898 held that the shooting of a misdemeanant by an officer in order to arrest him or to prevent his escape after arrest was wrongful. And these following cases cited by the court sustain

§ 161. 1. **Breaking from Arrest.**—*A fortiori,* after an arrest has been actually made, whether for felony or misdemeanor, the arrested person, should he attempt to break away, may be killed provided this exterme measure is necessary.[51] Hence.—

2. **Distinguished.**—It is seen that the only difference between felony and misdemeanor concerns a flying from arrest. One resisting arrest for a misdemeanor may be killed, when it cannot be otherwise effected, the same as in felony. Indeed, the same rule extends to arrests in civil cases.[52] Practically, those who are arresting others, or keeping the arrested persons, should employ great caution, and should not forget that it is only necessity which will justify the taking of life, and it will be for the jury to judge whether or not the necessity existed.[53] Still, if in any case the law absolutely forbade the taking of life, the wheels of justice must, in it, stop; and justice herself be humbled in the dust. To say to a defendant, "You may measure strength with the arresting officer, and avoid being taken if you are the stronger, or after your arrest you may break away unless he can prevail over you in a wrestle," is to elevate mere brute force to a position of command over the wheels of justice. Remote be the day when such a position will be given it in our country![54]

that proposition. U. S. v. Clark, 31 Fed. 710; Thomas v. Kinkead, 55 Ark. 502, 29 Am. St. 68; Reneau v. S., 2 Lea, 720, 31 Am. 626; Jackson v. S., 66 Miss. 95, 14 Am. St. 542; S. v. Sigman, 106 N. C. 728; and Head v. Martin, 85 Ky. 486; Handley v. S., 96 Ala. 48, 38 Am. St. 81; Smith v. S., 59 Ark. 132, 43 Am. St. 20.

51. New Crim. Law, II, §§ 647, 650; S. v. Sigman, 106 N. C. 728, 11 S. E. 520. See Caldwell v. S., 41 Tex. 86; Wright v. S., 44 Tex. 645; Com. v. West (Ky. 1908), 113 S. W. 76; S. v. Mills, 6 Penn. (Del.) 497, 69 A. 841.

52. 1 Hawk., P. C. (Curw. Ed.), 82.

53. S. v. Bland, 97 N. C. 438, 2 S. E. 460.

54. We have two recent cases which, in part or in full, are contrary to the text. They are Reneau v. S., 2 Lea, 720, 31 Am. R. 626, and Thomas v. Kinkead, 55 Ark. 502, 18 S. W. 854. In both these cases, the court appears to overlook the distinction in the text, and to deem that the officer has no right to take life in making an arrest for misdemeanor. In the former case, the learned judge refers to New Crim. Law, II, §§ 648, 649, as embodying

§ 162. 1. **Unlawful Arrest.**—One may resist the attempt to arrest him unlawfully, yet not to the taking of

the true doctrine. Yet as to misdemeanor, this passage in the work only speaks of flying from arrest, not of resisting it, or of attempting and escape. In Thomas v. Kinkead, the court denies that the authorities I cite sustain the doctrine. After reviewing the question, I am absolutely satisfied that they do, and that it would be waste of space to explain the matter in further detail. Besides, if there were no direct authorities on the subject, the result would be the same. The law is a system of reason, and to permit its officers to use only their muscles, and disarm them of all effective weapons when sent out to enforce its mandates, and leave its mandates unenforced when the defendant has more physical strength than the officer, would not be reason, or either legal or common sense. Utterly unmindful of the distinction which appeared in my text as it lay before the court, and in every other law-book on the subject, the learned judge who delivered the opinion said: "It is admitted that an officer cannot lawfully kill one who merely flees to avoid arrest for a misdemeanor, although it may appear that he can never be taken otherwise. If he runs, then, before the officer has laid his hands upon him with words of arrest, he may do so without danger to his life. But if, by surprise or otherwise, he be for a moment sufficiently restrained to constitute an arrest, and then 'break away,' the officer may kill him if he cannot overtake him. Such is the effect of the argument and of the rule in support of which it is made. We can see no principle of reason or justice on which such a distinction can rest, and we therefore hold that the force or violence which an officer may lawfully use to prevent the escape of a person arrested for a misdemeanor is no greater than such as might have been rightfully employed to effect his arrest. In making the arrest or preventing the escape, the officer may exert such physical force as is necessary on the one hand to effect the arrest by overcoming the resistance he encounters, or on the other to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life or to prevent a like harm to himself," pp. 508, 509. This overlooking of a fundamental distinction, and of the right to take life in making arrests for misdemeanor, and of the authorities in support of such right, is sufficient to account for this unfortunate decision. Yet one is appalled to think into what condition the doctrine of the court would lead the justice of this country. For example, contempt of court is a mesdemeanor. A pugilist enters the Supreme Court of the United States when in full session, and commands the proceedings to stop. The court orders the officer to arrest him, but he gently knocks the officer down without harming him, and quietly holds him by the throat. Other officers are sent to help, all

life.[55] In general, a homicide in resistance to this extent will be only manlaughter,[56] but there are circumstances in which it will be murder,[57] or, on the other hand, even justifiable.[58] So,—

2. **Breaking therefrom.**—One thus unlawfully arrested may escape if he can;[59] and an attempt to rearrest him will be equally unlawful with the first arrest.[60] Such is the general rule; but there are circumstances wherein, if the person arrested submits, he waives the objection; after which, he has no right to escape.[61]

of whom are treated in the same way. Next, the learned judges get down from the bench and take a hand in the fray. So things go on till the military power is called in. But no soldier is permitted to shoot. At last, gentle and soft measures prevail, and our misdemeanor man is marched off to prison. There he is committed to a keeper who, also, must not shoot. So he takes the keeper under his arm, and with him marches out. Meanwhile the dignity, the effectiveness, and the glory of our judicial affairs march out likewise. All persons who are confined for misdemeanor throughout the country, ascertaining their new privilege, and being either stronger or more numerous than their keepers, take to the open air, and revel in their new freedom. Is any argument needed to show that this, which every man knows to be contrary to the common course of things among us, is not the law? And did anybody ever undertake to estimate the number of keepers our prisons would require, if restricted to wrestling and hugging, with no use of the club, the sword, or the gun?

55. New Crim. Law, I, § 868 (2); S. v. Belk, 76 N. C. 10; U. S. v. Gay, 2 Gallis. 359; Creighton v. C., 83 Ky. 142, 4 Am. St. 143.

56. New Crim. Law, I, § 868 (2); C. v. Carey, 12 Cush. 246; P. v. Burt, 51 Mich. 199, 16 N. W. 378; Fleetwood v. C., 80 Ky. 1; Jenkins v. S., 3 Ga. App. 146, 59 S. E. 435; Thomas v. S., 91 Ga. 206, 18 S. E. 305; Holmes v. S., 5 Ga. App. —, 62 S. E. 716; Porter v. S., 124 Ga. 305, 52 S. E. 283; Williford v. S., 121 Ga. 176.

57. New Crim. Law, II, § 699; Creighton v. C., supra. See Lyon v. S., 22 Ga. 399. And see, on the entire subject of this paragraph of the text, Noles v. S., 26 Ala. 31, 62 Am. D. 711, and C. v. Drew, 4 Mass. 391, with the note to those cases in Hor. & Thomp. Cases on Self Defense, 713 et seq.

58. Dyson v. S., 14 Tex. Ap. 454; Jones v. S., 26 Tex. Ap. 1, 8 Am. St. 454.

59. S. v. Ward, 5 Harring. (Del.), 496; Alford v. S., 8 Tex. Ap. 545; Rex v. Curran, 3 Car. P. 397.

60. Rex v. Curvan, 1 Moody, 132; Porter v. S., 124 Ga. 297, 52 S. E. 283.

61. S. v. Phinney, 42 Me. 384; Wood v. Kinsman, 5 Vt. 588. See Roberson v. S., 53 Ark. 516, 14 S. W. 902.

§ 163. 1. How treat Arrested Person.—The custodian of an arrested person should treat him kindly;[62] but, as we have seen,[63] he may even inflict death to prevent escape, where no other means are available. *A fortiori*, he may tie or handcuff[64] him if necessary; and it is laid down that an officer acting honestly, from pure motives, is the sole judge of the necessity.[65] Hence,—

2. **Rearrest.**—One who breaks away from a lawful arrest or imprisonment[66] may be retaken without a fresh warrant;[67] even, it has been held, though the officer was consenting to the escape.[68]

II. *Without Warrant, by Unofficial Persons.*

§ 164. 1. Duty.—In most circumstances wherein a private person may make an arrest, it is simply his right; but by the old law which, though not much used in modern times, is plainly not obsolete, the arrest may be a duty the neglect whereof is indictable. Thus,—

2. **Misprision.**—One witnessing a treason or felony must arrest or bring to justice the offender, to neglect which is to commit the misdemeanor of misprision of treason or felony.[69] Or if but a dangerous wound is given, amounting

62. Skidmore v. S., 43 Tex. 93. And see Ryan v. Donnelly, 71 Ill. 100; Habersham v. S., 56 Ga. 61; S. v. Graham, 74 N. C. 646, 21 Am. R. 493; Lewis v. Raleigh, 77 N. C. 229.

63. Ante, § 161.

64. S. v. Sigman, 106 N. C. 728, 11 S. E. 520.

65. S. v. Stalcup, 2 Ire. 50. See post, § 731.

66. Post, §§ 1382, 1383. Or who is released on a void order. In re Troy, 67 Kan. 186, 72 P. 531. See, also, McCaslin v. McCord, 116 Tenn. 690, 94 S. W. 79.

67. Cooper v. Adams, 2 Blackf. 293; Ex parte Sherwood, 29 Tex. Ap. 334; S. v. Sigman, supra.

68. C. v. Sheriff, 1 Grant, Pa. 187. See 1 Chit. Crim. Law, 61. The question, in principle, stands thus: The warrant authorizes the officer to do two things: first, to take the person into custody; secondly, to hold him until lawfully discharged. Suffering an escape is not a lawful discharge; the warrant has not spent itself; the prisoner is not released from its restraining power. And though the officer has offended, it is a rule that the guilt of one person does not take away that of another, or confer privileges on the other.

69. New Crim. Law, I, § 716 et seq. See Kindred v. Stitt, 51 Ill. 401.

to murder if the party dies, those witnessing it must "apprehend the offender; otherwise they are liable to be fined and imprisoned for the neglect."[70] Consequently, as men are privileged to do their duty,—

§ 165. 1. Treason or Felony in Presence.—One who sees an act of treason or felony may arrest the offender.[71] Moreover,—

2. **Attempted in Presence.**—One who witnesses an attempt to commit a treason or felony is by law required to interfere to prevent it.[72] Hence, though such attempt is only a misdemeanor, the person witnessing it may arrest the wrongdoer.[73]

§ 166. 1. Extent of Duty—Consequences.—Such appears to be the extent to which *duty,* in the strict sense, requires arrests by private persons without warrants. Being indictable if they do not act, they have rights, not easily defined, greater than where the law merely permits the arrest. But—

2. **In Riots—Affrays, Etc.**—In a milder sense private persons are under the duty to suppress riots, treasonable assemblages, and breaches of the peace;[74] and a rising to quell them is lawful.[75] "Any private person present" may, says Blackstone, justifiably endeavor "to part the combatants, whatever consequences may ensue."[76] Not always need there be an arrest, but there should be in some cases. When the party arresting is sued for it, a plea of justification should contain the direct averment that there was an

70. Law of Arrests, 200. And see 1 Chit. Crim. Law, 16.

71. Phillips v. Trull, 11 Johns. 486; Keenan v. S., 8 Wis. 132; Long v. S., 12 Ga. 293; Martin v. Houck, 141 N. C. 317, 54 S. E. 291; S. v. Griffin, 74 S. C. 412, 54 S. E. 603.

72. New Crim. Law, I, § 716 et seq.

73. Rex v. Hunt, 1 Moody, 93; Handcock v. Baker, 2 B. & P. 260; Reuck v. McGregor, 3 Vroom, 70. By statute. P. v. Governale, 193 N. Y. 581, 86 N. E. 554.

74. Respublica v. Montgomery, 1 Yeates, 419, 421. And see Charge to the Bristol Grand Jury, 5 Car. & P. 261, note.

75. Rex v. Wigan, 1 W. Bl. 47. As to power of private persons to pursue and arrest one without a warrant who has escaped from jail. McCaslin v. McCord, 116 Tenn. 690, 94 S. W. 79.

76. 4 Bl. Com. 145.

affray or breach of the peace continuing at the time of the arrest; or, if it had subsided, that there was a well-founded apprehension of its renewal.[77] And—

3. **Ended.**—After the tumult is over, with no prospect of its renewal, it is too late to interfere without judicial process.[78] And—

§ 167. **Other Past Misdemeanors**—are within the same rule; namely, that a private person, or even an officer, cannot without a warrant[79] arrest one for a misdemeanor committed on an occasion already passed.[80]

§ 168. **In Treason or Felony,**—the rule is different. It is that if in fact there has been an offence of either of these degrees committed, and the private person on reasonable grounds suspects a particular individual, he, acting in good faith, may arrest him without incurring any liability, civil or criminal, should the suspicion prove unfounded.[81]

77. Price v. Seeley, 10 Cl. & F. 28. And see Knot v. Gay, 1 Root, 66. Power to arrest in breach of peace P. v. Morehouse, 6 N. Y. S. 763, 25 N. Y. St. 294; Webster v. Watts, 11 Q. B. 311.

78. Phillips v. Trull, 11 Johns. 486; S. v. Campbell, 107 N. C. 948, 12 S. E. 441; Wahl v. Walton, 30 Minn. 506, 6 N. W. 397.

79. Ante, §§ 166 (1), 167, 181 (2).

80. Fox v. Gaunt, 3 B. & Ad. 798. See Mathews v. Biddulph, 4 Scott (N. R.), 54, 1 Dowl., n. s., 216; Butler v. Turley, 2 Car. & P. 585; DeGraff v. S., 2 Okla. Cr. App. 519 (by statute); 103 P. 538; Gearity v. Strasbourger, 133 App. Div. 701, 118 N. Y. Sup. 257; Enright v. Gibson, 219 Ill. 550, 76 N. E. 869, aff'g 119 Ill. App. 411; S. v. Campbell, 107 N. C. 948, 12 S. E. 441.

81. U. S. v. Boyd, 45 Fed. 851; Ledwith v. Catchpole, Cald. 291; Brockway v. Crawford, 3 Jones (N. C.), 433, 67 Am. D. 250; Holley v. Mix, 3 Wend. 350, 20 Am. D. 702; Wakely v. Hart, 6 Binn. 316; C. v. Deacon, 8 S. & R. 47; Wrexford v. Smith, 2 Root, 171; Ashley's Case, 12 Co. 90; Long v. S., 12 Ga. 293; S. v. Roane, 2 Dev. 58; Reuck v. McGregor, 3 Vroom, 70; Lander v. Miles, 3 Ore. 35; Burns v. Erben, 40 N. Y. 463; Brooks v. C., 61 Pa. 352, 100 Am. D. 645; Doering v. S., 49 Ind. 56, 19 Am. R. 669. See post, § 181. There are cases intimating or holding that, to justify an arrest by a private person, the particular one arrested must be proved guilty. Rohan v. Sawin, 5 Cush. 281, 285; C. v. Carey, 12 Cush. 246, 251; Wash. Crim. Law, 176; Kindred v. Stitt, 51 Ill. 401; Stonehouse v. Elliott, 6 T. R. 315. See Kercheval v. S., 46 Ind. 120. But this is contrary to the general doctrine. See Gold v. Armer, 124 N. Y. S. 1069. Felony must have been committed. P. v. Governale, 193 N. Y. 581, 86

Nor is it otherwise though there is time to procure a warrant.[82] But if the offence has not been by any one committed, he may be compelled in a civil suit to pay damages to the party arrested, however strong or reasonable were his suspicions.[83] Yet, it seems, such a matter may be shown in mitigation of damages.[84] Yet, it seems, such a matter may be shown in mitigation of damages.[84] The doctrine of this section extends to all felonies, whether statutory or at common law, even to petit larceny.[85]

§ 169. Other Misdemeanors in Process of Commission.— In misdemeanors other than riots, affrays, and the like, there is some uncertainty as to the extent to which private persons witnessing them may interfere. In an old book[86] we read: "Any private person may arrest a common notorious cheat, going about in the country with false dice, and being actually caught playing with them, in order to have him before a justice of the peace; for, as the discouragement of such offenders is for the public good the restraining private persons from arresting them without a warrant from a magistrate would be consequently prejudicial, because it would give them an opportunity of escaping, and continuing their offences without punishment." And the same rule is regarded as extending to "any crime prejudicial to the public."[87] Also, by some opinions, "any private person may lawfully arrest a suspicious night-

N. E. 554. See also, In re Moebus, 73 N. H. 350, 62 A. 170.

82. Burns v. Erben, 40 N. Y. 463; Rohan v. Sawin, 5 Cush. 281, 284; Brooks v. C., supra; Martin v. S. (Ark. 1911), 133 S. W. 598.

83. Holley v. Mix, supra; Wakely v. Hart, supra; Findlay v. Pruitt, 9 Port. 195; Adams v. Moore, 2 Selw. N. P. 934; Allen v. Wright, 8 Car. & P. 522; Davis v. Russell, 2 Moore & P. 590, 5 Bing. 354; Cowles v. Dunbar, 2 Car. & P. 565; Doughty v. S., 33 Tex. 1; Croom v. S., 85 Ga. 718, 11 S. E. 1035; Marley v. Chase, 143 Mass. 196, 9 N. E. 767; Cryer v. S., 71 Miss. 467, 14 So. 461; Simmerman v. S., 16 Neb. 615, 21 N. W. 387; Farnam v. Feeley, 56 N. Y. 451; McCarthy v. DeArmit, 99 Pa. St. 63; Hadley v. Perks, L. R., 1 Q. B. 444, 12 Jur. N. S. 662, 35 L. J. M. C. 177.

84. Sugg v. Pool, 2 Stew. & P. 196; Rogers v. Wilson, Minor, 407, 12 Am. D. 61; Kercheval v. S., 46 Ind. 120.

85. P. v. Adler, 3 Par. Cr. 249; Tulley v. Corrie, 10 Cox, C. C. 640.

86. Ante, § 156, note, 164 (2).

87. Law of Arrests, 204, 205; Hawk., infra.

walker, and detain him till he make it appear that he is a person of good reputation."[88] Moreover,—

§ 170. 1. **Forcible Entry.**—The right of arrest without warrant has been held to attach to a constable witnessing a forcible entry amounting to a breach of the peace. And a bystander, directing the constable to do his duty, is not liable in a civil action. Yet the exemption does not necessarily extend to a bystander where no officer is present.[89]

2. **Other Misdemeanors,**—involving no public disturbance, afford little occasion for private interference, and the question of right is not always plain.[90]

88. Hawk., P. C., c. 12, § 20. Or one disturbing a church congregation and selling liquors within a prohibited distance. Rich v. Bailey, 30 Ky. L. 155, 97 S. W. 747.

89. Derecourt v. Corbishley, 5 Ellis & B. 188, 32 Eng. L. & Eq. 186. And see, in connection with this case, and on this general subject. Wheeler v. Whiting, 9 Car. & P. 262; Coward v. Baddeley, 4 H. & N. 478; Reg. v. Phelps, Car. & M. 180; Noden v. Johnson, 16 Q. B. 218, 2 Eng. L. & Eq. 201; Mackaley's Case, Cro. Jac. 279; Spalding v. Preston, 21 Vt. 9, 50 Am. D. 68; Rex v. Curran, 3 Car. & P. 397; Reg. v. Gwilt, 11 A. & E. 587, 3 Pr. & D. 176; Rex v. Howarth, 1 Moody, 207; Smith v. Donelly, 66 Ill. 464; Trask v. Payne, 43 Barb. 569; Lewis v. S., 3 Head, 127; Booth v. Hanley, 2 Car. & P. 288.

90. Mr. Greaves, an able English writer, in an article in the "Law Times," reprinted in the 3d Ed. of Cox & Saund. Crim. Law Consolidation Acts, Int., p. 64, contends, both on principle and authority, that in all cases where one is "committing any misdemeanor, he may be arrested by any private person" present, the same as in felony. He does not claim that this doctrine is established by any one decision; for in the nature of things a case on this subject could cover only its particular facts, not extending to a rule. See Bishop First Book, § 174-181, 463-472. But he deems this to be the fair result of the collected authorities. In support of this view, he adduces the doctrine stated ante, § 165, that a private person may arrest without warrant one who is attempting to commit a felony, the attempt being at common law a mere misdemeanor. Beyond this, the case which he deems the leading one is Holyday v. Oxenbridge, Cro. Car. 234. It is stated as follows: "In an action of trespass, etc., the defendant pleaded that the plaintiff communiter usus fuit an ill trade called cheating at play with false dice and defrauding people of their money; that he went to a house where he found the defendant and one Arnold, unexpert in such play, and induced them to play at dice with him for money, and the plaintiff playing with them 'with false dice subtly conveyed by the plaintiff

§ 171. In Principle,—the doctrine would seem to be that one who sees another committing a crime should do something to prevent it; or, failing in this, should bring him to justice. Passing over those high crimes in which the neglect of this duty is indictable, to those of a lower grade wherein the duty is a mere moral one, the reason of the thing would seem to be that the law will permit the person to discharge this moral duty by interfering, if disposed, to prevent the commission of the crime, or to arrest the doer, or both. Yet it might not allow this duty to be car-

(divers sums of the defendants' money, falso et fraudulenter depredatis), would have sought to escape; but the defendant, knowing certainly that he was deceived by the cheating with false dice, molliter manus imposuit on the plaintiff to take him before a justice to be examined concerning the said offense; and that the justice examined him and bound him to appear at the sessions, where he was convicted of the said offense. On demurrer to this plea, it was objected that 'one cannot without an officer, for any cause, and that upon his own suspicion only, arrest or stay any person unless in felony.' But all the court (the Chief Justice being absent) held 'the plea to be good; for it is shown that he was a common cheater and that he cozened with false dice [see New Crim. Law, II, § 157 (2)], and therefore the defendant led him to a justice of the peace; and it appears by the plea that there was good cause for staying him; for he was afterwards convicted of that offense. And it is pro bono publico to stay such offenders.'" The writer adds that this case "has never been questioned; and, on the contrary, it has been sanctioned by very great authority." He refers to Fox v. Gaunt, 3 B. & Ad. 798; Timothy v. Simpson, 5 Tyr. 244; Ingle v. Bell, 1 M. & W. 516; Cohen v. Huskisson, 2 M. & W. 477; Webster v. Watts, 11 Q. B. 311; Handcock v. Baker, 2 B. & P. 260. And he cites Hawkins and the Year Books to show that this was also the ancient doctrine. Still, I fail to discover cases which cover what I should deem to be every class of misdemeanor. Yet on this point it is fair to quote the learned writer's words: "When we find that all misdemeanors are of the same class [in reason, are they?]; that it is impossible to distinguish in any satisfactory way between one and another [is it?]; and that in the only case (Fox v. Gaunt, supra), where such a distinction was attempted, the court at once repudiated it; and when, on the question whether a party indicted for a misdemeanor was entitled to be discharged on habeas corpus, Lord Tenterden, C. J., said, in delivering the judgment of the court, 'I do not know how, for this purpose, to distinguish between one class of crimes and another. It has been urged that the same principle will warrant an arrest in the case of a common assault. That certainly will

ried to all lengths. If the thing done was not *malum in se*, but only *malum prohibitum*, or was of a nature not immediately disturbing the public repose, and not offending public morals, or the like, so injudicious would it be to make the arrest without a warrant, by a private person, when no perceptible harm would come from the delay necessary to call in public authority, that the courts could hardly be expected to sanction such an arrest.

follow:' (Ex parte Scott, 9 B. & C. 446.) And when, above all, the same broad principle that it is for the common good that all offenders should be arrested, applies to every misdemeanor, and that principle has been the foundation of the decisions from the earliest times, and was the ground on which Timothy v. Simpson [supra, this was a case where one had arrested another about to renew an affray in which he had been engaged, and the arrest was adjudged lawful] was decided—the only reasonable conclusion seems to be that the power to arrest applies to all misdemeanors alike, wherever the offender is caught in the act," p. 70. To me, reason indicates some distinction in misdemeanors. Can any man who sees another sell a glass of intoxicating liquor, where the sale is indictable, without complaint or warrant arrest and bring him before a magistrate? It seems to me that such a proceeding would not be of public benefit, consequently not legally justifiable. On the other hand, if a female night-walker should be caught practicing her seductions, there would be great reason to permit her arrest. But there are persons who deem that one of these forms of seduction is as bad, and should as much be put a stop to, as the other. If this is so, there is still a difference. In the one case, the thing is malum prohibitum only; in the other, it is malum in se. Or, suppose both to be deemed malum in se; in the one case, you stop a continuing evil; in the other, an evil merely in the particular instance, or, at least, one which will not be checked by the arrest, but which, not being personal to the offender, may be carried on by an agent. The one is ranked, in the law, as a nuisance; the other is not. But let us look at another sort of public nuisance. If a man is carrying on a manufactory from which unpleasant smells are at times emitted, and which may be indictable, is, therefore, any private person authorized to arrest him without complaint or warrant, and take him before a magistrate? Such a proceeding would be wholly unnecessary; it would tend to promote public disturbance, rather than check it; and it would be difficult to suppose that the law could give it countenance. It seems to me, therefore, impossible to say that the right of private persons to arrest without warrant extends to every misdemeanor. And the common understanding of the profession and mankind must have been so from the early periods of

§ 172. **Statutes**—have in some of our States, and in England, modified the common law doctrines under this and other sub-titles of this chapter.[91]

III. *Without Warrant, by Officers.*

§ 173. **Where Private Persons**—may arrest without a warrant, such an officer as a constable, sheriff, or watchman, may.[92] One purpose of this sub-title is to ascertain how much further the officer may go. Preliminarily let us inquire after—

§ 174. *The Office of Justice of the Peace:*—

In Early Times,—every county in England had by the common law its *conservators of the peace,* chosen by the people, "to conserve the king's peace, and to protect the obedient and innocent subjects from force and violence."[93] Thereupon, in 1327, the statute of 1 Edw. 3, c. 16, ordained "that in every county good men and lawful, which be no maintainers of evil, or barrators in the county, shall be assigned to keep the peace." This statute was the foundation of the office of justice of the peace; it, with various

our law until now; else our books of reports would contain cases in which arrests had been actually made in those circumstances in which, according to the views thus stated, they would seem to be of evil tendency. And see McLennon v. Richardson, 15 Gray, 74, 77 Am. D. 353; Danovan v. Jones, 36 N. H. 246; C. v. Carey, 12 Cush. 246; Main v. McCarty, 15 Ill. 441; In re Powers, 25 Vt. 261; Roberts v. S., 14 Mo. 138, 55 Am. D. 97; Jones v. S., 14 Mo. 409; White v. Kent, 11 Ohio St. 550; Tujacque v. Weisheimer, 15 La. Ann. 276; C. v. O'Connor, 7 Allen, 583; Stage Horse Cases, 15 Abb. Pr., n. s., 51, 62, 63; post, §§ 183, 184.

91. 24 and 25 Vict., c. 96, § 103, and some others; Morris v. Wise, 2 Fost. & F. 51; Doughty v. S., 33 Tex. 1; Kindred v. Stitt, 51 Ill. 401; Lewis v. S., 3 Head, 127; S. v. Lovell, 23 Iowa, 304; Wilson v. S., 11 Lea, 310; Tarvers v. S., 90 Tenn. 485, 16 S. W. 1041; Staples v. S., 14 Tex. Ap. 136; Lacy v. S., 7 Tex. Ap. 403; Luera v. S., 12 Tex. Ap. 257; Alford v. S., 8 Tex. Ap. 545; Smith v. S., 13 Tex. Ap. 507.

92. 2 Hawk., P. C., c. 13, § 1; Jenkins v. S., 4 Ga. Ap. 869, 62 S. E. 574; Stevens v. Com., 124 Ky. 32, 98 S. W. 284. As to right of officer to arrest one acting in a suspicious manner. Philips v. Leary, 114 A. D. 871, 100 N. Y. S. 200.

93. 2 Inst. 558.

statutes which followed, made these officers appointive instead of elective; and resulted in their being called justices, instead of conservators, of the peace.[94]

§ 175. **Their Later Powers,**—as expressed in the Commission, consisted, says Burn, "of two parts, or two different assignments. By the first assignment, any one or more justices have, not only all the ancient power touching the peace which the conservators of the peace had at the common law, but also that whole authority which the statutes have since added thereto. The second assignment defines their powers in Sessions."[95]

§ 176. **With Us,**—the result is that the law of England as thus stated, statutory and common, became unwritten law in our States.[96] Still, by reason of the pretty nearly complete legislation in most of the States, there is left but little room for the operation of this law among us.[97]

§ 177. 1. **Personal Arrest,**—by a justice of the peace, is practically almost unknown at the present day. Still, he has the power thus to apprehend one whom he has just cause to suspect of a felony which he knows to have been committed;[98] since even a private person could do the same. Perhaps, to an extent not defined, he can go further,[99]—a question which could seldom judicially arise. For—

2. **Arresting by Warrant or Verbal Order.**—Justices of the peace are now provided with under officers, and the regular course is to issue their verbal order or their warrant, and not to serve as servants to themselves. Therefore, since every statute must be interpreted as carrying with it what will make its provisions effectual, if legislation "gives a justice of the peace jurisdiction over any

94. Burn Just. tit. Justices of the Peace.

95. Ib. See also 4 Inst. 171. The commission is given in full in Burn Just. tit. Justices of the Peace. And see ante, § 149.

96. C. v. Leach, 1 Mass. 59; post, § 178.

97. C. v. Foster, 1 Mass. 488, 490, and C. v. McGahey, 11 Gray (Mass.), 194.

98. 2 Hale, P. C. 87.

99. See Law of Arrests, 171; Holcomb v. Cornish, 8 Conn. 375. By statute in South Carolina, he may arrest for misdemeanor in his presence. S. v. Boyd, 76 S. C. 104, 51 S. E. 542.

offence, or power to require a person to do a certain thing mentioned in the statute, by implication it gives a power to the justice to grant his warrant to bring the person accused of such offence, or the person that is compellable to do the thing ordained by the statute."[1]

§ 178. **By Verbal Order.**—It has always been deemed a leading function of this officer to preserve the peace. Hence, in the words of Lord Mansfield, he "may commit without complaint if he has reason to apprehend the peace will be broken, though not actually broken."[2] Even an insane man, not capable of crime, may thus be ordered into custody while breaking the peace;[3] or generally, to restrain him from mischief, if reasonably this step is necessary.[4] The statute of 34 Edw. 3, c. 1, in terms conferred upon these conservators of the peace the "power to restrain the offenders, rioters, and all other barrators, and to pursue, arrest, take, and chastise them according to their trespass or offence." The date is 1360, and it is generally accepted as common law with us.[5] If, therefore, a felony or other breach of the peace is committed in the presence of the justice, he may, as well by verbal order as by warrant, command the arrest of the offender.[6] And "the persons so commanded may pursue and arrest the offenders in his absence as well as presence."[7] So, if one lawfully arrested in this way escapes, the justice may verbally order him to be pursued and retaken.[8] *A fortiori,*—

1. Law of Arrests, 172. And see New Crim. Law, I, § 171; Stat. Crimes, § 137. Strictness of allegations not required in a warrant. Burdette v. Board, etc. (Ky. 1910), 125 S. W. 275. It should describe an offense in simple non-technical language. Aiken v. Lancaster Cotton Mills, 85 S. Car. 180, 67 S. E. 166; Owen v. S., 58 Tex. Cr. 261, 125 S. W. 405.

2. Brookshaw v. Hopkins, Lofft, 240, 243.

3. Lott v. Sweet, 33 Mich. 308. And see Paetz v. Dain, 1 Wils. Ind. 148.

4. Keleher v. Putnam, 60 N. H. 30, 49 Am. R. 304. See Look v. Dean, 108 Mass. 116, 11 Am. R. 323.

5. Kilty Rep. Stats. 220; Report of Judges, 3 Binn. 599, 612; Roberts Brit. Stats. 339. See ante, § 176.

6. 2 Hale P. C. 86; 2 Hawk. P. C., c. 13, § 14; C. v. McGahey, 11 Gray, 194.

7. 1 Hawk. P. C. (Curw. Ed.), p. 518, § 16.

8. C. v. McGahey, supra. See Rex v. Williams, 1 Moody 387.

§ 179. 1. **The Magistrate in his Court,**—if an offence is there committed in his presence, may verbally order the offender into custody; no warrant is necessary.[9] Likewise,—

2. **After Arrest without Warrant.**—Where one is arrested and brought before a magistrate without a warrant, nothing further is required to give him jurisdiction; for "why issue a warrant for the apprehension of a party already in custody?"[10] But a written complaint or information against the defendant, setting out his offence, is as necessary in such a case as in any other.[11]

3. **In Other Cases,**—where there has been no preceding arrest, and the command of the magistrate who did not witness the offence is essential thereto, he must issue his warrant.[12]

§ 180. **Statutes,**—not quite uniform in our States,—more or less regulate these questions; the reader is expected to consult them.[13]

§ 181. *Arrests without Warrant by Sheriffs, Constables, Police Officers, and the Like:*—

1. **Conservators of Peace.**—The sheriff was formerly in England, and is now in a measure with us, a conservator of the peace;[14] so are constables, watchmen, and other like officers. Their powers of arrest are similar; or the differ-

9. Lancaster v. Lane, 19 Ill. 242. Said Breese, J.: "The offender was in court, and therefore no warrant was necessary to bring him into court. . . . The office of a warrant is to do that which was already done," p. 245. And see O'Brian v. S., 12 Ind. 369; Holcomb v. Cornish, 8 Conn. 375. But not where offense is not in his presence. Snyder v. Thompson, 134 Ia. 725, 112 N. W. 239. See, Muscoe v. S., 86 Va. 443, 10 S. E. 534; Lindsay v. P., 67 Barb. (N. Y.) 548.

10. Hoggatt v. Bigley, 6 Humph. 236.

11. Tracy v. Williams, 4 Conn. 107, 10 Am. D. 102.

12. 2 Hale P. C. 86. See 1 Hawk. P. C. (Curw. Ed.), p. 518; 2 Ib., c. 13, § 14; Rex v. Gardener, 1 Moody, 390.

13. Sands v. Benedict, 5 Thomp. & C. 19, 2 Hun, 479; Mayo v. Wilson, 1 N. H. 53; Forrist v. Leavitt, 52 N. H. 481; Robison v. U. S., 4 Okla. Cr. Ap. 336, 111 P. 984; S. v. Leindecker, 91 Minn. 277, 91 N. W. 972; S. v. Boyd, 108 Mo. Ap. 518, 84 S. W. 191; Snead v. Bonnoil, 49 A. D. 330, 63 N. Y. S. 553; affirmed in 166 N. Y. 325, 59 N. E. 899; P. v. Hochstim, 36 Misc. 562, 73 N. Y. S. 626.

14. Coyles v. Hurtin, 10 Johns. 85; post, § 225, 4 Bl. Com. 292.

ences, if any, are not defined in the books. If a statute or municipal by-law makes any officer a conservator of the peace, it confers on him by construction all the common law authority of peace officers to make arrests.[15] The reader should consult on this subject the statutes of his own State.

2. **Past Offences.**—For a past offence below felony, none of these officers can arrest without a warrant;[16] unless, for example, it is an assault liable to end in felony by the death of the injured person.[17] In past felony or treason, the distinction between officers and private persons arresting is this: should the one arrested not be proved guilty, the private person will not be justified unless an offence had been committed by some one; while the officer is justified though no offence had been committed; yet both must have had reasonable cause to suspect the one apprehended.[18] For

15. Veneman v. Jones, 118 Ind. 41, 10 Am. St. 100, 20 N. E. 644. As to statutory powers of policeman. P. v. Van Houton, 13 Misc. 603, 35 N. Y. S. 186, 69 N. Y. S. 265; S. v. Carpenter, 54 Vt. 551; Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899.

16. Ante, § 167; Shanley v. Wells, 71 Ill. 78; C. v. Carey, 12 Cush. 246; C. v. McLaughlin, 12 Cush. 615; Reg. v. Spencer, 3 Fost. & F. 854; Reg. v. Lockley, 4 Fost. & F. 155; Reg. v. Marsden, Law Rep., 1 C. C. 131, 11 Cox, C. C. 90; Coupey v. Henley, 2 Esp. 540; C. v. Bryant, 9 Phila. 595; C. v. O'Connor, 7 Allen, 583, 584; Pinkerton v. Verberg, 78 Mich. 573, 18 Am. St. 473, 44 N. W. 579; S. v. Davidson, 44 Mo. Ap. 513; S. ex rel. Brennan v. Dierker, 101 Mo. Ap. 636, 74 S. W. 153; Marshall v. Cleaver, 4 Penn. (Del.) 450, 56 A. 380; Markey v. Griffin, 109 Ill. Ap. 212; Percival v. Bailey, 70 S. C. 72, 49 S. E. 7; Earles v. S., 47 Tex. Cr. 559, 85 S. W. 1; Contra, Snyder v. Thompson, 134 Ia. 725, 112 N. W. 239; S. v. Pritchett, 219 Mo. 696, 119 S. W. 386; Martin v. Houck, 141 N. C. 317, 54 S. E. 291; Holmes v. S.. 5 Ga. Ap. 166, 62 S. E. 716; Mundine v. S., 37 Tex. Cr. 5, 38 S. W. 719.

17. Coupey v. Henley, 2 Esp. 540; Shanley v. Wells, supra.

18. Ante, § 168; Davis v. Russell, 2 Moore & P. 590, 5 Bing. 354; Eanes v. S., 6 Humph. 53, 44 Am. D. 289; Rohan v. Sawin, 5 Cush. 281; Beckwith v. Philby, 6 B. & C. 635, 9 D. & R. 487; Hobbs v. Branscomb, 3 Camp. 420; Lawrence v. Hedger, 3 Taunt. 14; Samuel v. Payne, 1 Doug. 359; Ledwith v. Catchpole, Cald. 291; Rex v. Woolmer, 1 Moody, 334; Nicholson v. Hardwick, 5 Car. & P. 495; John v. S., 3 Head, 127, 146; C. v. Presby, 14 Gray, 65; S. v. Underwood, 75 Mo. 230; Neal v. Joyner, 89 N. C. 287; Gold v. Armer, 124 N. Y. S. 1069.

Contra by statute—in New York to justify an arrest by officer without a warrant even in felony the

when a charge of this high nature is made to an officer, he must act upon it, and pursue and arrest the suspected person at once;[19] and it would block the wheels of justice if he could not do his official duty without being answerable in damages to the party, should the event not sustain in evidence the suspicion.[20]

§ 182. 1. **Reasonable Suspicion.**—The court determines, as of law, what is a reasonable cause for suspicion; the jury, whether or not it existed in the particular case[21] An example of reasonable cause is where the governor, by proclamation, announces that a felony has been committed;[22] or if one is walking in the streets at night, and there are indications that he has done a felonious act, a peace officer may arrest and detain him for examination, though the proof of an actual felony committed may be wanting.[23] Or,—

2. **Accused.**—A charge to an officer, by a third person, that one has committed a felony, will ordinarily, we have seen,[24] justify and even require his arrest;[25] but not necessarily if the accuser is an accomplice.[26] So an officer may safely take possession of one arrested and delivered to him by a private individual for felony; nor need the accusation be in technical form.[27]

felony must have been committed or attempted to be committed. Reasonable suspicion or probable cause is not enough. Stearns v. Titus, 193 N. Y. 272, 85 N. E. 1077, reversing 119 A. D. 885, 104 N. Y. S. 1148.

19. Cowles v. Dunbar, 2 Car. & P. 565; Kirk v. Garrett, 84 Md. 383, 35 A. 1089; P. v. Glennon, 74 N. Y. S. 794, 37 Misc. 1, 10 N. Y. Ann. Cases, 365, 16 N. Y. Cr. 297, and see Wills v. Jordan, 20 R. I. 630, 41 A. 233; Muscoe v. Com., 86 Va. 443, 10 S. E. 534.

20. Samuel v. Payne, supra.

21. Davis v. Russell, 2 Moore & P. 590, 5 Bing. 354; Philips v. Leary, 114 App. Div. 871, 100 N. Y. S. 200.

22. Eanes v. S., 6 Humph. 53, 44 Am. D. 289.

23. Lawrence v. Hedger, 3 Taunt. 14. And see C. v. Presby, 14 Gray, 65; Reg. v. Turberfield, Leigh & C. 495, 10 Cox C. C. 1.

24. Ante, § 181 (2).

25. Hough v. Marchant, Moody & M. 510; Samuel v. Payne, 1 Doug. 359; Hobbs v. Branscomb, 3 Camp. 420; Brish v. Carter, 98 Md. 445, 57 A. 210.

26. Isaacs v. Brand, 2 Stark, 167.

27. Rex v. Ford, Russ. & Ry. 329; Hedges v. Chapman, 2 Bing. 523, 10 Moore, 148.

§ 183. 1. **Crimes in Presence of Officer.**—Plainly officers may do what private persons can, in arresting those who break the peace and commit crimes in their presence, as already explained.[28] This power is so full that it leaves little else to be claimed for the officer; though practically his official character has weight, and he may properly enter upon enterprises which a private person should not. Still, something remains beyond, not easily defined. Without saying what may be competent to private persons, let us enumerate:—

2. **In Course of Commission.**—As conservators of the peace,[29] these officers may avert a criminal act in the process of commission before them, either by arresting the doers,[30] or by seizing and detaining the instruments of crime.[31] And the power of arrest extends, possibly, to any indictable wrong in their presence.[32] Some hold this proposition to be without limit;[33] even, we have seen,[34] when applied to private individuals. And statutes and ordi-

28. Ante, §§ 166, 169-171; Hammond v. S., 147 Ala. 29, 41 So. 761; Sanderson v. S. (Ala. 1910), 53 So. 109; Jenkins v. S., 3 Ga. Ap. 146, 59 S. E. 835; Cook v. Hastings, 150 Mich. 289, 14 Det. Leg. 665, 114 N. W. 71; Com. v. Robinson, 27 Ky. L. 14, 84 S. W. 319; O'Malley v. Whitaker, 118 La. 906, 43 So. 545; Martin v. Houck, 141 N. C. 317, 54 S. E. 291; Hughes v. S., 2 Ga. Ap. 29, 58 S. E. 390; S. v. Pritchett, 219 Mo. 696, 119 S. W. 386.

29. Ante, § 181 (1).

30. Ross v. Leggett, 61 Mich. 445, 1 Am. St. 608, 28 N. W. 695; Ex parte Morrill, 35 Fed. 261; Jackson v. S., 7 Ga. Ap. 414, 66 S. E. 982; Hendrickson v. Com., 26 Ky. L. 224, 81 S. W. 266 (discharging firearms); Higby v. Penn. R. Co., 209 Pa. St. 452, 58 A. 858; Reed v. Com., 30 Ky. L. 1212, 100 S. W. 856; Paulding v. Lane, 104 N. Y. S. 1051, 55 Misc. 57; Hull v. S. (Tex. 1907), 100 S. W. 403; Stevens v. Com., 30 Ky. L. 290, 98 S. W. 284.

31. Spalding v. Preston, 21 Vt. 9, 50 Am. D. 68; Reg. v. Light, Dears. & B. 332, 7 Cox C. C. 389; Shanley v. Wells, 71 Ill. 78; O'Connor v. Bucklin, 59 N. H. 589; Hughes v. S., 2 Ga. Ap. 29, 58 S. E. 390; Conkling v. Whitmore, 832 Ill. Ap. 574.

32. McCullough v. C., 67 Pa. 30; C. v. Deacon, 8 S. & R. 47; Willis v. Warren, 1 Hilton, 590; Boyleston v. Kerr, 2 Daly, 220; Vandeveer v. Mattocks, 3 Ind. 479; Taylor v. Strong, 3 Wend. 384; In re Powers, 25 Vt. 261; Butt v. Conant, Gow. 84.

33. Stage Horse Cases, 15 Abb. Pr., n. s., 51, 62, 63. And see Wolf v. S., 19 Ohio St. 248, 258.

34. Ante, § 170 and note.

nances widely permit these arrests for violations of municipal by-laws.[35] But by reason, and on other authorities, arrests on view have their limits;[36] as, the officer was held in New Hampshire not to have this power in a case of placing a nuisance, not specified in the police law, in a highway.[37] Yet doubtless a persistent placing and continuing to place nuisances in a public and thronged street would often justify the officer in interfering by arrest without waiting to obtain a warrant. On this principle,—

3. **Keeping Ways clear.**—These officers have often occasion, with no warrant from a magistrate, to keep the public ways clear for travel. And they are to do what each emergency requires, not palpably more. To illustrate: if one by playing music collects a crowd in a thoroughfare, a policeman may request him to go on, and may lay his hand on and slightly push him. Then, if on so small a provocation the man strikes the policeman with a dangerous weapon, and kills him, it will be murder; otherwise, if the policeman gives him a blow and knocks him down.[38] So, if one is turning toward the wall in a street on a particular occasion, a watchman may remonstrate with but not collar him.[39]

4. **Disturbances of Peace.**—Of course, one of these officers may do all that is lawful for a private person[40] in

35. Roberts v. S., 14 Mo. 138, 55 Am. D. 97; S. v. Roberts, 15 Mo. 28; Tujacque v. Weisheimer, 15 La. Ann. 276; Burke v. Bell, 36 Me. 317; Jamison v. Gaernett, 10 Bush, 221; S. v. Lafferty, 5 Harring. (Del.) 491; Butolph v. Blust, 41 How. Pr. 481; Shanley v. Wells, 71 Ill. 78; Roddy v. Finnegan, 43 Md. 490; P. v. Pratt, 22 Hun, 300; S. v. Cantieny, 34 Minn. 1, 24 N. W. 458; S. v. Freeman, 86 N. C. 683.

36. Butolph v. Blust, 5 Lans. 84; Hennessy v. Connolly, 13 Hun, 173; Thomas v. Henderson, 125 La. 292, 51 So. 202.

37. Danovan v. Jones, 36 N. H. 246. Compare with ante, § 170 and note.

38. Reg. v. Hagan, 8 Car. & P. 167. And see Hardy v. Murphy, 1 Esp. 294.

39. Booth v. Hanley, 2 Car. & P. 288. See also on this general subject: Imason v. Cope, 5 Car. & P. 193; Stocken v. Carter, 4 Car. & P. 477; Bowditch v. Balchin, 5 Exch. 378; Roddy v. Finnegan, 43 Md. 490; ante, § 170 (2), note.

40. Ante, § 166 (2).

suppressing a riot, affray, or the like. And "from time immemorial constables and watchmen had authority, without warrant, to arrest those whom they saw engaged in an affray of breach of the peace, and to detain them until they should find proper sureties."[41] If the officer hears a noise in a private house, amounting to a breach of the peace, he may enter through an unfastened door, and arrest those whom he there finds committing an assault or affray in his presence.[42] Still more obviously, therefore, he may do the same if the house is public; because any one is entitled to enter a public house.[43] These and other like offences are commonly termed—

5. **Breaches of the Peace.**—The officer may arrest any persons who in his presence are committing a breach of the peace.[44] We shall by and by see that any indictable offence is a "breach of the peace" under a statute authorizing Sunday arrests.[45] In the law of our present subject, the term is less broad, and signifies any criminal act of

41. City Council v. Payne, 2 Nott & McC. 475, 478; C. v. Deacon, 8 S. & R. 47; S. v. Brown, 5 Harring. (Del.) 505; U. S. v. Pignel, 1 Cranch C. C. 310; Shanley v. Wells, 71 Ill. 78.

42. C. v. Tobin, 108 Mass. 426; Weaver v. McGovern, 28 Ky. L. 883, 90 S. W. 984 (noise in polling place heard by officer).

43. Rex v. Smith, 6 Car. & P. 136. See Reg. v. Prebble, 1 Fost. & F. 325. As to officers acting by request in suppressing disturbances in and clearing public and private houses, see Reg. v. Mable, 9 Car. & P. 474; Rex v. Bright, 4 Car. & P. 387; Rex v. Hems, 7 Car. & P. 312, 313. Under Martial Law. Where, or putting down an insurrection, a State has declared martial law, its military officers may arrest any one whom they reasonably believe to be engaged in it; and may order a house to be forcibly entered and searched, upon reasonable belief that he is there concealed; but they should use no more force than is necessary, and they will be liable for any oppressive abuse, or wilful injury to person or property. Luther v. Borden, 7 How. U. S. 1.

44. S. v. Dierberger, 96 Mo. 666, 9 Am. St. 380, 10 S. W. 168; S. v. Bowen, 17 S. C. 58; Boutte v. Emmer, 43 La. Ann. 980, 9 So. 921; S. v. Dennis, 2 Marv. (Del.), 443, 43 A. 261; S. v. Guy, 46 La. Ann. 1441, 16 So. 404; P. v. Rounds, 67 Mich. 482, 35 S. W. 77; S. v. Dierberger, 96 Mo. 666, 10 S. W. 168; Douglas v. Barber, 18 R. I. 459, 28 A. 805; S. v. Leindecker, 91 Minn. 277, 91 N. W. 277. Compare Hard v. S., 119 Tenn. 583, 108 S. W. 1064; S. v. Mills, 6 Pen. (Del.), 497, 69 A. 841.

45. Post, § 207.

a sort to disturb the public repose;[46] as, assault and battery,[47] shouting and noise at a late hour of the night,[48] profane and indecent language in the street in the presence of people.[49] It is but repetition to say that the arrest can be made only when the act is done in the real or constructive presence of the officer.[50] By what is probably the better view, a plainly impending breach, not yet fully developed, suffices.[51]

6. **How promptly.**—If the officer does not make the arrest when the breach of the peace or other misdemeanor is being committed, but goes away and returns after the entire transaction is over, with no danger of its renewal, he is too late to proceed without a warrant.[52] But the arrest need not be instant, it may be made at a reasonable time and fit opportunity;[53] or, it has been said, on quick pursuit.[54]

§ 184. 1. **Statutes**—have more or less, in England and our States, extended or defined the right of arrest without

46. New Crim. Law, I, § 536 (1); P. v. Johnson, 86 Mich. 175, 24 Am. St. 116.

47. S. v. Sims, 16 S. C. 486; S. v. Barrows, 57 Vt. 576; S. v. McAfee, 107 N. C. 812, 12 S. E. 435; Howell v. Jackson, 6 Car. & P. 723.

48. S. v. Russell, 1 Houst. Crim. 122; P. v. Johnson, 86 Mich. 175, 24 Am. St. 116, 48 N. W. 870.

49. Davis v. Burgess, 54 Mich. 514, 50 N. W. 540; P. v. Craig, 152 Cal. 42, 91 P. 997 (vagrancy though existing may be committed "in presence of officer" and justify arrest). Stevens v. Com., 30 Ky. L. 290, 98 S. W. 284 (drunk and disorderly); Early v. S., 50 Tex. Cr. 344, 97 S. W. 82.

50. P. v. Bartz, 53 Mich. 493, 19 N. W. 161; P. v. Haley, 48 Mich. 495, 12 N. W. 671; S. v. Sims, 16 S. C. 486; Sternack v. Brooks, 7 Daly, 142; S. v. Croker, 1 Houst. Crim. 434; S. v. McAfee, supra; P. v. Johnson, supra; Winn v. Hobson, 22 J. & S. 330. Arrests for loitering, Price v. Tehan (Conn.), 79 A. 68.

51. Hayes v. Mitchell, 80 Ala. 183; Quinn v. Heisel, 40 Mich. 576; Pinkerton v. Verberg, 78 Mich. 573, 18 Am. St. 473, 44 N. W. 579; Timothy v. Simpson, 1 Cromp. M. & R. 757; Ingle v. Bell, 1 M. & W. 516; Price v. Seeley, 10 Cl. & F. 28.

52. Reg. v. Walker, Dears. 358, 6 Cox C. C. 371, 25 Eng. L. & Eq. 589; Reg. v. Mardsen (Law Rep.), 1 C. C. 131; Roberts v. S., 14 Mo. 138; S. v. Roberts, 15 Mo. 28; Yates v. S., 127 Ga. 813, 66 S. E. 1017. Compare the last two cases with C. v. Hastings, 9 Met. 259.

53. Taylor v. Strong, 3 Wend. 384, 386.

54. Hanway v. Boultbee, 4 Car. & P. 350, 1 Moody & R. 15. And see P. v. Pool, 27 Cal. 572.

a warrant.[55] One enlarging the right—that is, in restraint of personal liberty—is to be strictly construed.[56]

2. **Constitutional.**—Most of these statutes have, where the question has arisen, been adjudged constitutional;[57] some have been pronounced otherwise.[58]

IV. *Private Persons assisting the Officer in Arrest.*[59]

§ 185. 1. **Command Assistance.**—Whatever be the rights of a private person, an officer who is making an arrest, either with or without a warrant, or securing his prisoner afterward, may, if he deems it necessary, call upon a bystander for help, or even command the aid of all persons in his precinct.[60] A refusal is indictable,[61] provided he is proceeding by lawful authority;[62] or, if he is not, his command will be a justification to one who, knowing his official character, comes in good faith to his assistance.[63] Again,—

55. As, see Simmons v. Millingen, 2 C. B. 524, In re Carr, 3 Saw. 316; Corbett v. Sullivan, 54 Vt. 619; Ballard v. S., 43 Ohio St. 340, 1 N. E. 76; Ex parte Sherwood, 29 Tex. Ap. 334, 15 S. W. 812; Jacobs v. S., 28 Tex. Ap. 79, 12 S. W. 408; Johnson v. S., 5 Tex. Ap. 43; C. v. Coughlin, 123 Mass. 436; S. v. Grant, 76 Mo. 236; Phillips v. Fadden, 125 Mass. 198; Childers v. S., 156 Ala. 96, 47 So. 70; Jenkins v. S., 3 Ga. Ap. 146, 59 S. E. 835; Com. v. McCann, 29 Ky. L. 707, 94 S. W. 645; S. v. Boyd, 108 Mo. Ap. 518, 84 S. W. 191.

56. Ramsey v. Foy, 10 Ind. 493; S. v. Dale, 3 Wis. 795; Sanders v. Davis, 153 Ala. 375, 44 So. 979.

57. Byers v. C., 42 Pa. 89; Jones v. Root, 6 Gray, 435; Mason v. Lothrop, 7 Gray, 354; Williams v. S., 44 Ala. 41; S. v. Bielby, 21 Wis. 204. And see Rohan v. Sawin, 5 Cush. 281.

58. Judson v. Reardon, 16 Minn. 431; Pinkerton v. Verberg, 78 Mich. 573, 18 Am. St. 473, 44 N. W. 579.

59. For the form of indictment, etc. for refusing assistance, see Dir. & F., §§ 844-847.

60. 2 Hawk. P. C. c. 13, § 7; S. v. Shaw, 3 Ire. 20; Coyles v. Hurtin, 10 Johns. 85; Mitchell v. S., 7 Eng. 50, 54 Am. D. 253; Burdett v. Colman, 14 East. 163; Martin v. S., 89 Ala. 115, 18 Am. St. 91, 8 So. 23; Watson v. S., 83 Ala. 60, 3 So. 441; P. v. Nihell, 144 Cal. 200, 77 P. 916; Martin v. S., 89 Ala. 115, 8 So. 23; Hamlin v. Com., 11 Ky. L. R. 348, 12 S. W. 146; Firestone v. Rice, 71 Mich. 377, 38 N. W. 885.

61. New Crim. Law, I, § 469.

62. S. v. Shaw, 3 Ire. 20.

63. McMahan v. Green, 34 Vt. 69, 80 Am. D. 665; Dougherty v. S., 106 Ala. 63, 17 S. W. 393; Reed v. Rice, 2 J. J. Mar. 44, 19 Am. D.

2. **Obstructing.**—One who obstructs an officer lawfully arresting or detaining another,[64] or encourages the other to resist,[65] may be taken into custody, but not needlessly beaten.

§ 186. 1. **Officer present.**—The officer, to justify a private person thus assisting him, must be actually or constructively present commanding. There is no precise distance which the two may be apart. If, for example, a sheriff has called in persons to help in making an arrest or preserving the peace, he is deemed to be constructively with them, though not within sight or hearing, if his absence is in furtherance of the common design. For it would often, said Kent, C. J., "be impossible that he should be actually present in every place where power might be wanting." Therefore where the officer was away procuring more assistance in suppressing a riot, it was held that those whom he left behind to guard a house in which were assembled the persons to be arrested, could not lawfully, during this his temporary absence, permit them to escape.[66]

2. **Acting through Third Person.**—There is a difference between the officer's thus calling in assistance, and attempting to act through the agency of a third person. Therefore when a constable committed a warrant of arrest to his son, who executed it while the father was in sight a half-mile off, the arrest was held to be illegal.[67] Though an

122; Kirbie v. S., 5 Tex. Ap. 60; Rogers v. S., 62 Ala. 170; Phillips v. S., 66 Ga. 755; S. v. James, 80 N. C. 370; Firestone v. Rice, 71 Mich. 377, 15 Am. St. 266, 38 N. W. 885; Watson v. S., supra. And see Forrist v. Leavitt, 52 N. H. 481; Schawb v. Dietrichs, 1 Wils. (Ind.) 153. If the person making the arrest is not a public officer, but assumes to be acting by special authority, those assisting him will not be protected unless the authority exists in fact. Dietrichs v. Schaw, 43 Ind. 175; Purdy v. S. (Tex. Cr. Ap. 1910), 131 S. W. 558.

64. Levy v. Edwards, 1 Car. & P. 40; Anonymous, 1 East P. C. 305; Coyles v. Hurtin, supra; McMahan v. Green, 34 Vt. 69; Roddy v. Finnegan, 43 Md. 490; Gibson v. S., 118 Ga. 29, 44 S. E. 811; P. v. Smith, 131 Mich. 70, 9 Det. L. N. 199, 90 N. W. 666; Parish v. S., 130 Ala. 92, 30 So. 474.

65. White v. Edmunds, Peake, 89.

66. Coyles v. Hurtin, 10 Johns. 85, Spencer, J., dissenting. And see, to the like effect, C. v. Field, 13 Mass. 321.

67. Rex v. Patience, 7 Car. & P. 775.

officer could execute the particular function by a deputy, the authorization must be in writing, not oral.[68]

V. *The Arrest under Warrant.*

§ 187. 1. **A Warrant of Arrest**—is a written command, properly or even necessarily in the name of the State,[69] from a person or tribunal having the authority, commonly but not always of necessity in every State under seal, addressed to some competent officer or private person, to apprehend and according to the law of the case dispose of a particular individual for a specified crime.[70] It should appear on its face to have duly proceeded from an authorized source.[71] It need not set out the crime with the fullness of an indictment, but it should contain a reasonable indication thereof. Minor defects will not render it inadequate as a justification to the officer.[72]

2. **The Officer,**—having in his hand such a warrant duly addressed to him, should execute it; and he will be protected, even though he knows it was obtained for an undue purpose.[73] But it is otherwise if the warrant is illegal on its face, or if the magistrate had no jurisdiction, and he must decide the question of jurisdiction at his peril.[74] And

68. P. v. Moore, 2 Doug. Mich. 1.

69. 4 Chit. Crim. Law (2d Eng. Ed.), 198; 4 Bl. Comm. 290-292; White v. C., 6 Binn. 179, 6 Am. D. 443; Leighton v. Hall, 31 Ill. 108, 83 Am. D. 205.

70. Post, §§ 227, 228; 4 Bl. Com. 290-292; P. v. Mead, 92 N. Y. 415; Ex parte Nisbett, 8 Jur. 1071; Caudle v. Seymour, 1 Q. B. 889, 1 G. & D. 454, 5 Jur. 1196.

71. Pierce v. S., 17 Tex. Ap. 232. Yet more precisely as to which, see post, § 228 (1).

72. Martin v. S., 32 Ark. 124; Floyd v. S., 12 Ark. 43, 44 Am. Dec. 250; S. v. Jones, 88 N. C. 671; S. v. Bailey, 32 Kan. 83, 3 P. 769; C. v. Hart, 123 Mass. 416; Johnson v. S., 73 Ala. 21; Caudle v. Seymour, 1 Q. B. 889, 1 G. & D. 454; Haskins v. Ralston, 69 Mich. 63, 13 Am. St. 376, 37 N. W. 45; P. v. Sacramento, etc. Ass'n, 12 Cal. Ap. 471; S. v. Riley (Minn. 1910), 124 N. W. 11, 13; Heckman v. S., 64 Mis. 48, 24 N. W. 473.

73. S. v. Weed, 1 Fost. (N. H.) 262, 53 Am. D. 188; S. v. James, 80 N. C. 370; S. v. Pritchett, 219 Mo. 696, 119 S. W. 386; Spear v. S., 120 Ala. 351, 25 So. 46.

74. Grumon v. Raymond, 1 Conn. 40, 6 Am. D. 200; S. v. Crow, 6 Eng. (Ind.) 642; Durr v. Howard, 1 Eng. (Ind.) 461; Noles v. S., 24 Ala. 672; S. v. McDonald, 3 Dev. 468; Lampson v. Landon, 5 Day

though he is not justified in making an arrest on a void process, he is on one voidable for some irregularity or mistake.[75]

It is usually sufficient if the warrant contains such a description of the offense as will inform the accused of what he has to meet. And it is assumed that the accused is a person of ordinary intelligence which is perhaps indefinite. And if it appears that he is not of sufficient intelligenec or of mental capacity to comprehend the warrant, it should be explained to him though a failure to do so would not render the arrest invalid.[75a]

3. **Return.**—It is an officer's duty to make due return to the court or magistrate of all processes he serves;[76] hence, fully to secure the law's protection for an arrest, he should return the warrant.[77]

(Conn.), 506, 508; Griswold v. Sedgwick, 6 Cow. (N. Y.) 456; Sanford v. Nichols, 13 Mass. 286; Reynolds v. Corp. 3 Caines (N. Y.), 267; Hall v. Howd, 10 Conn. 514, 27 Am. D. 696; Welch v. Scott, 5 Ire. 72; Donahoe v. Shed, 8 Met. (Mass.) 326; Rex v. Hood, 1 Moody, 281; P. v. Koeber, 7 Hill (N. Y.), 39; Camp v. Moseley, 2 Fla. 171; Sleight v. Ogle, 4 E. D. Smith (N. Y.), 445; Moore v. Watts, Breese, 18; Gurney v. Tufts, 37 Me. 130, 58 Am. D. 777; Tracy v. Williams, 4 Conn. 107, 10 Am. D. 102; S. v. Leach, 7 Conn. 452, 456, 18 Am. D. 118; S. v. Curtis, 1 Hayw. 471; Connor v. C., 3 Binn. (Pa.) 38; Sweet v. Negus, 30 Mich. 406; Howard v. Reid, 51 Ga. 328; Noles v. S., 24 Ala. 672; S. v. Stern, 4 Mo. Ap. 385; S. v. Wimbush, 9 S. C. 309; Howard v. S., 121 Ala. 21, 25 So. 1000.

75. Nichols v. Thomas, 4 Mass. 232, 234; Pearce v. Atwood, 13 Mass. 324; Sanford v. Nichols, 13 Mass. 286, 288; Holt v. Hook, 14 Mass. 210, 213. And see Boyd v. S., 17 Ga. 194; 1 Chit. Crim. Law, 60, 61.

75a. Adams v. Coe, 123 Ala. 664, 26 So. 652; In re Stewart, 60 Kan. 781, 57 P. 976; Krauskopf v. Tallman, 38 Ap. Div. 415, 56 N. Y. Sup. 967; affirmed 170 N. Y. 561, 62 N. E. 1096; S. v. Hallback, 40 S. C. 298, 18 S. E. 919; In re Durant, 60 Vt. 176, 12 A. 650; Lacy v. Palmer, 93 Va. 159, 24 S. E. 930, 57 Am. St. 795, 31 L. R. A. 822; Fetkenhauer v. S., 112 Wis. 491, 88 N. W. 294.

76. Dalt. Sheriff, 162, 178; Imp. Sheriff, 333, though a failure to make a return does not authorize the prisoner's discharge.

77. Tubbs v. Tukey, 3 Cush. 438, 50 Am. D. 744; Slomer v. P., 25 Ill. 70, 76 Am. D. 786. And see Reg. v. Davis, Leigh & C. 64; s. c. nom. Reg. v. Davies, 8 Cox C. C. 486; Stone v. Dana, 5 Met. (Mass.) 98; Brock v. Stimson, 108 Mass. 520, 11 Am. R. 390.

4. **Function of Warrant performed.**—After the party has submitted, and recognized to appear at court, he cannot be arrested on the same warrant, though he does not appear.[78] In like manner, in a civil case, an officer cannot make the arrest after the return day is passed.[79]

§ 188. **To whom Warrant addressed.**—At common law, the warrant of arrest may be addressed as well to a private person,[79a] as to an officer;[80] it is so in some of our States.[81] But it is always practically better to address it to an officer.[82] In other of our States, the power of private persons, or of officers out of their precincts, to serve warrants directed specially to them, does not exist, or it exists only under restrictions.[83]

§ 189. 1. **Who serve Warrant.**—Where the law empowers a specially designated private person to serve the warrant, if, says Chitty, it is "directed to the sheriff, he may authorize others to execute it;" yet the deputation must be in writing.[84] "If it be given to an inferior officer, he must personally put it in force, though any one may law-

78. S. v. Queen, 66 N. C. 615. See Doyle v. Russell, 30 Barb. (N. R.) 300; S. v. Downs, 8 Ind. 42. Nor on a second offense for which he is not under arrest. S. v. Riley (Minn. 1910), 124 N. W. 13.

79. Stoyel v. Lawrence, 3 Day (Conn.), 1; Prescott v. Wright, 6 Mass. 20. In vacation the clerk may issue warrant. S. v. Johnson (Kan. 1899), 58 P. 559; Com. v. Posson, 182 Mass. 339, 65 N. E. 381; otherwise only the justice. An alias warrant may be issued when an original is lost. Clayton v. S., 122 Ala. 91, 26 So. 118. A warrant cannot be reissued after its return. S. v. Queen, 66 N. C. 615.

79a. But only if unavoidable. Tesh v. Com. 4 Daud (Ky.), 522; Com. v. Blair Co. Jail Warden, 8 Pa. Dist. 149, 2 Hawk. P. C. c. 13, § 27.

80. Kendal's Case, 5 Mod. 78, 81, 1 Ld. Raym. 65, 66; 1 Hale P. C. 581.

81. C. v. Keeper of Prison, 1 Ashm. 183; Kelsey v. Parmelee, 15 Conn. 260; Meek v. Pierce, 19 Wis. 300. And see Stuart v. Hines, 33 Iowa, 60; Wells v. Jackson, 3 Munf. 458.

82. 2 Hawk. P. C. c. 13, § 27; 1 Hale P. C. 581. Either by name or as one of a class. S. v. Wenzel, 77 Ind. 428; Abbott v. Booth, 51 Barb. (N. R.), 546.

83. C. v. Foster, 1 Mass. 488; Noles v. S., 24 Ala. 672. Specially as to North Carolina, see S. v. Dean, 3 Jones (N. C.) 393. And see ante, § 177 (2).

84. Ante, § 186 (2); a private prosecutor ought not to be designated to serve a warrant, McCray v. S., 134 Ga. 416, 68 S. E. 62.

fully assist him. And if a warrant were generally directed to all constables, no one could act under it out of his own precinct; and, if he did, he would have been a trespasser. But if it were directed to a particular constable by name, he might execute it anywhere within the jurisdiction of the justice by whom it was granted."[85] A warrant directed to one class of officers cannot be served by an officer of another class.[86]

2. **Arrest beyond Jurisdiction.**—Without the aid of a statute, a magistrate cannot send his warrant,[87] or authorize it to be executed,[88] out of his own county or district. The remedy for this used to be by the process called backing the warrant; that is, by a justice of the peace in the other county, where the arrest was to be made, writing his name upon it.[89] But generally in our States this inconvenience is provided for , by differing statutes, in some other and better way.[90]

85. 1 Chit. Crim. Law, 48; Rex v. Chandler, 1 Ld. Raym. 545, 546; Coleman v. S., 121 Ga. 594, 49 S. E. 716; Mann v. Com., 118 Ky. 800, 82 S. W. 438.

86. Reg. v. Sanders (Law Rep.), 1 C. C. 75, 10 Cox C. C. 445. Questions of this sort, and of the authority of particular officers, will differ with the statutes of the States. And see C. v. Martin, 98 Mass. 4; C. v. Hastings, 9 Met. 259. Defacto marshal may make a valid arrest. McDuffie v. S., 121 Ga. 580, 49 S. E. 708. The warrant ought to describe accused specifically by his surname and christian name, unless these be unknown when there should be an identifying description. Warrants to apprehend all persons suspected of crime. Money v. Leach, 3 Murr. 1742; 1 Wm. Bl. 555; 4 Bl. Comm. 291, or warrants signed in blank leaving an arresting officer to fill in names. Rafferty v. P., 69 Ill. 111, 18 Am. 601; Com. v. Crotty, 10 Allen (Mass.), 403, 87 Am. Dec. 669; 1 Chitty Cr. L. 39; 1 East P. C. 110, 111; 1 Hale P. C. 465, are invalid.

87. 2 Hale P. C. 115.

88. 1 Chit. Crim. Law, 48; Lawson v. Buzines, 3 Harring. (Del.) 416; Little v. Rich (Tex. Civ. Ap. 1909), 118 S. W. 1077; Ex parte Sykes, 46 Tex. Cr. 51, 79 S. W. 528.

89. 1 Chit. Crim. Law, 45, 1 Hayes Crim. Stat. Law Ir. 71; Rex v. Kynaston, 1 East, 117; Clark v. Cleveland, 6 Hill (N. Y.), 344; C. v. Jailer, 1 Grant (Pa.), 218.

90. Sturm v. Potter, 41 Ind. 181; Johnston v. S., 2 Yerg. 58; Blake v. Burke, 42 Md. 45; Krug v. Ward, 77 Ill. 603; Parrish v. S., 14 Md. 238; Papineau v. Bacon, 110 Mass. 319; C. v. Wolcott, 110 Mass. 67; Doyle v. Russell, 30 Barb. 300; P. v. Shaver, 4 Par. Cr. 45. See S. v.

§ 190. **Possession of Warrant.**—To justify an arrest under a warrant, the officer must have it in possession;[91] as, if though delivered to him he leaves it at his office or station-house, it will not protect him.[92]

§ 191. 1. **Whether show Warrant.**—Private persons, and officers out of their precincts, to whom warrants are specially directed, "and even officers if they be not sworn and commonly known," must, as expressed by Hawkins, "show their warrants if demanded."[93] Known and sworn officers, within their precincts, need not do this; yet they "ought to acquaint the party with the substance of their warrants."[94] This liberty of the known officer has been pointed out by Lord Kenyon as a "most dangerous doctrine;" since no one should be required to take another's mere word in such a matter.[95] But something ought to be allowed to official position; and if one publicly known to be an officer of the precinct undertakes to arrest another under the claim, thereby implied, that he has a warrant in due form, the other ought to yield sufficiently to furnish opportunity for calmly looking into the question. Hence the arrest, the explanation, and the reading of the warrant when demanded, "are obviously successive steps. They

Dooley, 121 Mo. 591, 26 S. W. 558; Ledbetter v. S., 23 Tex. Ap. 247, 5 S. W. 226; Smotherman v. S., 140 Ala. 168, 37 So. 376.

91. If two officers act together, the possession of one suffices. P. v. Durfee, 62 Mich. 487; Adams v. S., 48 S. E. 910, 121 Ga. 163; Webb v. S., 51 N. J. L. 189, 17 A. 113; Smith v. Clark, 53 N. J. L. 197, 21 A. 41; P. v. McLean, 68 Mich. 480, 36 N. W. 231. Contra, Maughan v. S., 7 Ga. Ap. 660, 67 S. E. 842; warrant in possession of deputy, Hill v. S. (Ga. Ap. 1910), 68 S. E. 814.

92. Galliard v. Laxton, 2 B. & S. 363, 9 Cox C. C. 127; Reg. v. Chapman, 12 Cox C. C. 4, 2 Eng. Rep. 160; Codd v. Cabe, 1 Ex. D. 352; S. v. Spaulding, 34 Minn. 361, 25 N. W. 793. Compare, Maughan v. S., 7 Ga. Ap. 660, 67 S. E. 842; P. v. Shanley, 40 Hun, 4771.

93. U. S. v. Jailer of Fayette, 2 Abb. U. S. 265, 275; Frost v. Thomas, 24 Wend. 418; S. v. Curtis, 1 Hayw. 471; C. v. Field, 13 Mass. 321; Arnold v. Steeves, 10 Wend. 514; McCray v. S., 134 Ga. 416, 68 S. E. 62.

94. 2 Hawk. P. C. c. 13, § 28; McCray v. S., 134 Ga. 416, 68 S. E. 62; Com. v. West (Ky. 1908), 113 S. W. 76.

95. Hall v. Roche, 8 T. R. 187. And see 1 Chit. Crim. Law, 41; 1 Hayes Dig. Crim. Stat. Law (2d Ed.), 69.

cannot all occur at the same instant of time." And in the case of a known officer, "the explanation must follow the arrest; and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged, and his power over his prisoner acquiesced in."[96]

2. **Known Official Character.**—It is thus seen that the official character of the arresting person, when a public officer, is presumed to be known to the other. And where the officer is a fresh incumbent, such knowledge will be inferred if he wears the accustomed badge of officer.[97] In like manner, if he were elected by the people, the like knowledge ought to be presumed. So that—

§ 192. **Arrests without Warrant.**—We may hold with the majority of the English judges that where a watchman, of known official character,—"dressed in a watchman's coat and had his lantern,"—is proceeding without a warrant, he may arrest a person really on a charge of robbery, without disclosing the charge to him, though in fact the prisoner has done nothing justifying the arrest.[98] And one committing an offence, and arrested by a known officer, can sufficiently discern the reason without being told.[99]

§ 193. 1. **Prisoner getting Warrant.**—An officer who incautiously permits the prisoner to take the warrant to

96. C. v. Cooley, 6 Gray, 350, 356, 357, opinion by Merrick, J. To the like effect, S. v. Townsend, 5 Harring. (Del.) 487, 488; Arnold v. Steeves, 10 Wend. 514. And such may be deemed the American doctrine. Kernan v. S., 11 Ind. 471; Drennan v. P., 10 Mich. 169; S. v. Freeman, 8 Iowa, 428, 74 Am. D. 317; Plasters v. S., 1 Tex. Ap. 673; S. v. Green, 66 Mo. 631; King v. S., 89 Ala. 43, 18 Am. St. 89, 8 So. 120. But see S. v. Garrett, Winst. 1. 144, 84 Am. D. 359. Some of our statutes require the officer to show his warrant if demanded. P. v. Shanley, 40 Hun. 477.

97. Yates v. P., 32 N. Y. 509. And see C. v. Tobin, 108 Mass. 426.

98. Rex v. Woolmer, 1 Moody, 334. See, also, Rex v. Gordon, 1 East P. C. 315, 352.

99. Wolf v. S., 19 Ohio St. 248. And see P. v. Pool, 27 Cal. 572; Sanderson v. S. (Ala.), 50 So. 109, 111; Roberson v. U. S., 4 Okla. Cr. Ap. 336, 111 P. 984, Contra, Franklin v. Amerson, 118 Ga. 860, 45 S. E. 698.

peruse, may, if its return is refused, use "just so much violence as is necessary to retake it, and no more." [1]

2. **Official Discretion.**—In the nature of things, the officer may exercise some discretion in making an arrest, though not to the abandonment of his legal duty.[2] The public prosecuting attorney may herein advise but cannot control him.[3]

VI. *The Breaking of Doors in Making Arrest.*

§ 194. **Any Building,**—other than that technically termed the castle or dwelling-house, which consists of the cluster of buildings used for habitation and its collateral purposes, as explained in "Statutory Crimes," [4] may, even in civil cases, be broken open to make an arrest.[5]

§ 195. **Castle.**—It has been explained in other connections that the law deems a man's dwelling-house his castle, that he may close it against intruders, including officers who come to attach his person or goods on civil process,[6] and that he may defend it even, when necessary, to the taking of life.[7] But the castle is not a refuge from arrests for crime; for it was the law in England that no man can have a castle against the king.[8] Yet it imposes on the officer some cautions, and regulations of their steps, in making arrests in the dwelling-house.

§ 196. **When break Castle.**—The right to break outer doors to make an arrest under a lawful warrant extends to

1. Rex v. Milton, Moody & M. 107; s. c. nom. Rex. v. Mitton, 3 Car. & P. 31.

2. Firestone v. Rice, 71 Mich. 377, 15 Am. St. 266, 38 N. W. 885.

3. Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539; U. S. v. Scroggins, 3 Woods, 529.

4. Stat. Crimes, § 290. See McLennon v. Richardson, 15 Gray, 74, 77 Am. D. 353; Whalley v. Williamson, 7 Car. & P. 294.

5. Penton v. Brown, 1 Keb. 698; Fullerton v. Mack, 2 Aikens, 415; Howe Pr. 150; Jacob v. Measures, 13 Gray, 74; S. v. Brown, 5 Harr. (Del.), 505.

6. Oystead v. Shed, 13 Mass. 520, 7 Am. D. 172; Cook's Case, Cro. Car. 537.

7. New Crim. Law, I, §§ 858, 859, 877; II, §§ 707, 1259.

8. Semayne's Case, 5 Co. 91a; C. v. Reynolds, 120 Mass. 190, 196, 21 Am. R. 510. As to informing accused of official capacity, Sanderson v. S. (Ala. 1910), 53 So. 109.

all the indictable wrongs, and to all other lawful arrests for past offences, whether by officers or private individuals.[9] It also extends to process for legislative contempts

9. Malevcrer v. Spinke, 1 Dy. 35b, 36b; Curtis's Case, Foster, 135; Launock v. Brown, 2 B. & Ald. 592; 2 Hawk. P. C. c. 14, §§ 3-7. I have stated the doctrine as I believe it to be in just principle,—and, on the whole, by the authorities,—though on one or two points there is in the books more or less adverse. This is not surprising; for the adjudications are few, and much of what we read on this subject is drawn from the old dicta. Coke says one of the resolutions in Semayne's Case was that "in all cases when the king is party, the sheriff, if the doors be not opened, may break the party's house, either to arrest him or to do other execution of the king's process, if otherwise he cannot enter." Semayne's Case, 5 Co. 91a, 91b. No one doubts that this right of the "sheriff" extends equally to a constable, and to a private person to whom a warrant of arrest is lawfully directed. And the same doctrine would seem in reason to apply also to arrests without warrant; for they are made just as much as the others in behalf of the State and in its cause,—the question of warrant or no warrant pertaining to form, not substance; and the arrest in either case being by authority of law, on behalf of the public. So that, as Hawkins tells us, the doors may be broken "where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person." 2 Hawk. P. C. c. 14, § 7. I think there is no dispute as to the soundness of this doctrine. "But," he adds "where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day that no one can justify the breaking open doors in order to apprehend him." Ib. To the like effect, and where the arrest is by a private person, see Brooks v. C., 61 Pa. 352, 100 Am. D. 645; Washb. Crim. Law, 175, 176. So that if a murder is committed, and suspicion points however clearly to A as the murderer, and A shuts himself in his house declining to surrender himself, and it is Saturday night at an hour too late to get a warrant from a magistrate, there is no way but to give him till Monday morning to escape, if he can; unless parties, arresting him for the public good, will take upon themselves the burden of proving, at a trial, not only that there had been a homicide, and the arrested party is clearly suspected of it, but that the homicide was felonious, and the person arrested is in fact guilty. I do not propose to pass under review the various dicta sustaining this absurdity. See 1 Chit. Crim. Law, 52, 53. In case of conflict, why not adopt the opinion which is the more reasonable, and is in accord with the general doctrine? For example, Hale, in his first volume, says, "By the book of 13 Edw. 4, 9a, a man that arrests upon suspicion of felony may break open doors, if the party refuse upon

and contempts to the ordinary courts of justice.[10] And one already arrested,[11] even in a civil case, commits by getting away from the officer a contempt for which, if he retreats into his house, the outer doors may be broken.[12] So they may be on a process against one to find sureties for his good behavior,[13] or to search the house for stolen goods;[14] and, in general, on search-warrants against the house, lawfully granted.[15]

§ 197. **Crime in Presence.**—Returning to the right of arrest for a crime in the arresting person's presence,[16] if it is an affray or other offence less than felony there is not generally occasion to inquire into the right of breaking outer doors; for ordinarily what is done in a barred and bolted house is not in the presence of a man outside. Still, "when an affray," says Chitty,[17] "is made in a house, in the view or hearing of a constable, he may break open the outer door in order to suppress it.[18] So, in some extreme cases, it has been holden lawful even for a private individual to break and enter the house of another in order to prevent him from murdering another who cries out for

demand to open them, and much more may it be done by the justice's warrant." 1 Hale P. C. 583. No breaking in without warrant. Fairmount Athletic Club v. Bingham, 113 N. Y. S. 905, 61 Miss. 419.

10. Burdett v. Abbott, 14 East, 1, 157, 162, 5 Dow, 165, 4 Taunt. 401, 410; Brigg's Case, 1 Rol. 336, stated, with further facts, 14 East, 157. A contempt of court is an offense against the State, New Crim. Law, II, § 269 (3); and a breach of the peace, Bayley, J., in Burdett v. Abbott, supra, at p. 162; Anonymous, Willes, 459.

11. Cahill v. P., 106 Ill. 621.

12. Genner v. Sparks, 1 Salk, 79; s. c. nom. Genner v. Sparks, 6 Mod. 173. Anonymous, Lofft, 390. And see Fraser's note to Semayne's Case, supra; Foster, 320; 2 Hawk. P. C. c. 14, § 9; 1 Chit. Crim. Law, 58.

13. Anonymous, Sir F. Moore, 606; 1 Chit. Crim. Lew, 58, referring to 2 Hawk. P. C. c. 14, § 3; Moore, 606, 668; Foster, 136; Dick. Just. Arrest, III.

14. 1 Chit. Crim. Law, 54.

15. Ib. 57; Cooper v. Booth, 3 Esp. 135. And see Kneas v. Fitler, 2 S. & R. 263; Com. v. Superintendent of County Prison, 5 Pa. Dist. R. 635.

16. Ante, §§ 165, 166, 169-171, 178, 179, 183.

17. 1 Chit. Crim. Law, 52, 53.

18. 2 Hale P. C. 95; 1 Hawk. P. C. c. 63; 2 Ib., c. 14; Dick. Just. Arrest, III.

assistance."[19] But not even an officer can without a warrant break an outer door to arrest persons within who are merely engaged in unlawful gaming, or the selling of intoxicating liquor without license.[20] Yet—

§ 198. **Fled to House.**—If those who in the presence of the officer have committed an affray, "fly to a house, and are immediately pursued by him, and he is not suffered to enter . . . to apprehend the affrayers," he may break the door.[21]

§ 199. **What a Breaking.**—Undoubtedly an officer not entitled to break outer barriers may use more or less stratagem to gain admission;[22] but it is a breaking to procure, by a false pretence, one within the house to open the door, and then without permission rush in with violence.[23]

§ 200. **Inner Doors.**—An officer who, in the service of process civil or criminal, has lawfully passed through the outer door into a house, may proceed to break inner doors, if necessary.[24] But—

§ 201. **Notice and Demand.**—Whether the lawful breaking is of an inner or outer door, it can be done only after the officer has notified the inmates of his business, and demanded admittance.[24a] Otherwise, asked Abbott, C. J., "how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost."[25]

19. Handcock v. Baker, 2 B. & P. 260.

20. McLennon v. Richardson, 15 Gray, 74, 77 Am. D. 353.

21. 2 Hawk. P. C. c. 14, § 8.

22. Rex v. Backhouse, Lofft, 61.

23. Parke v. Evans, Hob. 62a. And see Waterhouse v. Saltmarsh, Hob. 263a.

24. Lee v. Gansel, Cowp. 1; Ratcliffe v. Burton, 3 B. & P. 223, 229; Rex v. Bird, 2 Show. 87; Smith v. Butler, Comb. 326.

24a. S. v. Oliver, 2 Houst. (Del.) 585; McLehnon v. Richardson, 15 Gray (Mass.), 74, 77 Am. Dec. 353.

25. Launock v. Brown, 2 B. & Ald. 592, 594; Semayne's Case, 5 Co. 91a; Lloyd v. Sandilands, 2 Moore, 207; Burdett v. Abbott, 14 East, 1, 163; Ratcliffe v. Burton, 3 B. & P. 223, 229; Waterhouse v. Saltmarsh, Hob, 263a. And see Cahill v. P., 106 Ill. 621.

§ 202. **Locked in.**—If after a lawful entry the officer is locked in the house, he may break out, or be rescued by his associates breaking in.[26]

§ 203. **After an Escape**—from an arrest wherein the breaking of doors was not allowable, to justify a breaking in rearrest[27] the first arrest must have been complete and lawful; otherwise there could be no escape.[28] But it can make no difference that the officer consented to the going: for this he had no right to do.[29]

§ 204. **A Third Person's Castle,**—"if the offender fly to it refuge," says Chitty,[30] "is not privileged, but may be broken open after the usual demand; for it may even be so upon civil process."[31] This is universal doctrine.[32] "But tnen,—

§ 205. **Person to be arrested not found.**—"It is said," continues this author, "it is at the peril of the officer that the party against whom he has obtained the warrant be found there; for otherwise he will be a trespasser."[33] This qualification of the doctrine is not without American support.[34] Still it rests on no adequate reason; and various analogies lead to the better view that if the officer acts in good faith, and on due notice to the occupants of the house,

26. White v. Whiltshire, Cro. Jac. 555; 1 Chit. Crim. Law, 58, referring to Cro. Jac. 555; Foster, 319; 6 Mod. 173; 2 Hawk. P. C. c. 14, § 11, 1 Hale P. C. 459; Dick. Just. Arrest, III.

27. Ante, § 196.

28. New Crim. Law, II, §§ 1074, 1077, 1094; Genner v. Sparks, 6 Mod. 173, 174; s. c. nom. Genner v. Sparkes, 1 Salk. 79.

29. New Crim. Law, II, § 1104.

30. 1 Chit. Crim. Law, 57.

31. 5 Co. 91; 2 Hale P. C. 117; Curtis v. Hubbard, 1 Hill (N. Y.), 336; Walker v. Fox, 2 Dana, 404; De Graffenreid v. Mitchell, 3 McCord, 506, 15 Am. D. 648.

32. C. v. Reynolds, 120 Mass. 190, 21 Am. R. 510; Oystead v. Shed, 13 Mass. 520, 7 Am. D. 172; Allen v. Martin, 10 Wend. 300, 25 Am. D. 564; Hawkins v. C., 14 B. Monr. 395, 61 Am. D. 147; Bell v. Clapp, 10 Johns. 263, 6 Am. D. 339; S. v. Shaw, 1 Root, 134; Kelsy v. Wright, 1 Root, 83; S. v. Smith, 1 N. H. 346. As to right of private persons pursuing escaped prisoners, McCaslin v. McCord, 116 Tenn. 690, 94 S. W. 79.

33. 2 Hale P. C. 117; 5 Co. 93a; Johnson v. Leigh, 1 Marshall, 565, 6 Taunt. 246.

34. Hawkins v. C., 14 B. Monr. 395, 61 Am. D. 147.

he will be justified though he does not find the person to be arrested.[35]

VII. *Executing the Warrant, when, and who exempt.*

§ 206. 1. **How proceed.**—Chitty[36] explains that an officer with a warrant of arrest "should, as soon as he conveniently can, though he may do so at any time afterwards until the object of the warrant has been satisfied,[37] proceed with secrecy to find out and actually arrest the party;"[38] a refusal or neglect to do which will be indictable.[39] "But at some of the police offices it is the practice to deliver the warrants for common assaults to one of the constables, who goes round to the parties accused and states the time when they must go before a magistrate, in order that they may be provided with sureties."

2. **Directed to Several.**—Again;[40] "A warrant directed to several may be executed by one;[41] but it is said that if it direct four *jointly and not severally* to arrest, then they must all be present."[42]

§ 207. 1. **Time of Day.**—The arrest may be made as well in the night as in the day,[43] and at any hour.[44]

2. **Sunday.**—The old common law permitted arrests on Sunday both in civil causes and in criminal. Though judicial acts could not then be lawfully done, ministerial could; for, says Coke, "otherwise peradventure they can never

35. C. v. Reynolds, 120 Mass. 190, 21 Am. R. 510; C. v. Irwin, 1 Allen, 587; Barnard v. Bartlett, 10 Cush. 501, 57 Am. D. 123.

36. 1 Chit. Crim. Law, 47, 48.

37. Dickenson v. Brown, Peake, 234.

38. Dalt. Just. 169; Dick. Just. Arrest, III.

39. Crouther's Case, Cro. Eliz. 654; 1 Hale P. C. 581.

40. 1 Chit. Crim. Law, 49.

41. 1 East P. C. 320; Hut. 127; Rex v. Hobbs, Yelv. 25; s. c. nom., Rex v. Hobs, Cro. Eliz. 913; White v. Whitshire, Palmer, 52; Dalt. Just., c. 169; Dick. Just. Arrest, II.

42. Boyd v. Durand, 2 Taunt. 161.

43. 1 Chit. Crim. Law, 16; Mackalley's Case, 9 Co. 65a, 66a; S. v. Smith, 1 N. H. 346; Bell v. Clapp, 10 Johns. 263, 6 Am. D. 339; S. v. Shaw, 1 Root, 134; Kelsy v. Wright, 1 Root, 83; S. v. Brennan's Liquors, 25 Conn. 278; Williams v. S., 44 Ala. 41. As to oppression by night arrests. Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166.

44. Wright v. Keith, 24 Me. 158.

be executed."[45] Thereupon it was by 29 Car. 2, c. 7, § 6, made unlawful and void to serve on "the Lord's Day" any writ, process, warrant, order, judgment, or decree; except in cases of treason, felony, or breach of the peace." The date of this statute is 1676. Kilty mentions this sixth section as "in force" in Maryland.[46] The Pennsylvania judges omit it from their list.[47] It would not be safe to say how the question stands in most of the States.[48] Nor is it of practical consequence; because, in most or all, there are statutes in like terms with this one. And it has been held in England that—

3. **Breach of Peace, Etc.**—Under the exception of "treason, felony, or breach of the peace," all indictable offences are comprehended,[49]—a meaning a little broader than is given the term "breach of the peace" in some other connections.[50] Thus, an arrest may be made on Sunday for a criminal conspiracy, as being a "breach of the peace;"[51] likewise, for a contempt of court.[52] And such is believed to be the American doctrine.[53]

45. Mackalley's Case, 9 Co. 65a, 66b.

46. Kilty Rep. Stats. 242.

47. Report of Judges, 3 Binn. 595.

48. See New Crim. Law, I, § 499 (1).

49. Stat. Crimes, § 198. See Pearce v. Atwood, 13 Mass. 324, 347; Rawlins v. Ellis, 2 Cox C. C. 96.

50. New Crim. Law, I, § 536; ante, § 183 (4, 5); post, § 264n.

51. Rawlins v. Ellis, 16 M. & W. 172.

52. Anonymous, Willes, 459; Ex parte Whitechurch, 1 Ark. 55. See ante, § 196, note. Durnford, in a note in his edition of Willes, says, in this place, an arrest may be made on Sunday "under an escape warrant," Moore's Case, 2 Ld. Raym. 1028; or one wrongfully escaped "may be retaken on a Sunday without a warrant," Ib.; Atkinson v. Jameson, 5 T. R. 25. "But bail cannot take the defendant on a Sunday in order to surrender him, Brookes v. Warren, 2 W. Bl. 1273; nor can a defendant, who has been convicted on a penal statute, be arrested on a Sunday for non-payment of the penalty, Rex v. Myers, 1 T. R. 265; nor can a rule nisi for an attachment for non-payment of a sum of money pursuant to the master's *allocatur* be served on a Sunday, McIleham v. Smith, 8 T. R. 86."

53. Pearce v. Atwood, 13 Mass. 324, 347; Watts v. C., 5 Bush, 309; Parish v. S., 130 Ala. 92, 30 So. 474; S. v. Connell, 96 Me. 172, 51 A. 873; Wright v. Dressel, 140 Mass. 147, 3 N. E. 9; Weldon v. Colquitt, 62 Ga. 449, 35 Am. 128. Thus, arrests for the violation of the liquor laws

§ 207 a. 1. **Exemptions from Arrest.**—There are various exemptions from arrest, of particular persons or persons in particular circumstances, familiar in civil jurisprudence, but they do not generally apply to crime.[54] Yet—

2. **Foreign Embassador, Etc.**—Not even for crime is it lawful to arrest a foreign sovereign, his diplomatic agent, or a registered domestic or domestic servant of either.[55] So—

3. **Members of Congress.**—By our national Constitution, the Senators and Representatives "shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same."[56] The words of this exception, it is perceived, are those of the statute of Charles, already explained,[57] and there is no just room for doubt that it should be interpreted in the same way; so that, on any criminal charge, a member of the Senate or House of Representatives may be arrested like a private person.[58] Also—

4. **Members of the State Legislatures**—are generally exempt from arrest in civil cases, not in criminal.[59]

5. **Married Women**—are liable to be arrested for crime, like other persons.[60]

may be made on Sunday. Keith v. Tuttle, 28 Me. 326; Main v. McCarty, 15 Ill. 441.

54. "The exemptions which exist in civil cases here cease to operate." 1 Chit. Crim. Law, 12. And see U. S. v. Kirby, 7 Wal. 482; C. v. Keeper of Jail, 13 Phila. 573.

55. New Crim. Law, I, §§ 125-128; R. S. of U. S., §§ 4062-4065.

56. Const. U. S., art. 1, § 6.

57. Ante, § 207 (2, 3).

58. Story Const., § 865; S. v. Smalls, 11 S. C. 262; Miner v. Markham, 28 Fed. 387; U. S. v. Wise, 28 Fed. Cas. 16, 746a, 1 Hayw. & H. (U. S.) 82. Such is the English parliamentary law; a member of Parliament being liable, for example, to arrest for a seditious libel. Wilkes's Case, 19 How. St. Tr. 981, 993. And see In re Armstrong, 1892, 1 Q. B. 327, 17 Cox C. C. 349; Goudy v. Duncombe, 1 Exch. 430; In re Anglo-French Co-op. Soc., 14 Ch. D. 533. **Others.** As to other persons in the employment of the United States, see U. S. v. Kirby. 7 Wal. 482; Penny v. Walker, 64 Me. 430, 18 Am. R. 269.

59. Coffin v. Coffin, 4 Mass. 1, 29, 3 Am. D. 189; Scott v. Curtis. 27 Vt. 762; see S. v. Polacheck (Wis. 1898), 77 N. W. 708.

60. Rex v. Morris, 2 Leach, 1096; Rex v. Taylor, 3 Bur. 1679.

VIII. *Arrests of Persons and Goods under Search-Warrants.*[61]

§ 208. 1. **Breaking.**—Chitty[62] states that the door, if shut, and not opened on demand, "may be broken open;[63] and so may boxes after the keys have been demanded; and though the goods be not found the officer will be excused."[64]

2. **Follow Warrant.**—The officer should strictly obey his warrant; as, if it directs him to seize sugar, he must not take tea.[65] But he may safely bring the goods which the warrant describes, though they turn out not to be the particular ones the applicant for it had in mind.[66] In general, the officer may seize only the goods specified; yet in one case it was observed that if certain articles "had from their nature been likely to furnish evidence of the identity of the articles stolen and mentioned in the warrant," perhaps they might have been lawfully taken possession of with the rest.[67] This qualification of the doctrine comes from a principle to be considered under our next sub-title.

§ 209. 1. **The place searched**—can only the one stated in the warrant;[68] as where it is a man's dwelling-house,

61. See post, §§ 240-246.

62. 1 Chit. Crim. Law, 66.

63. See ante, § 196. Notice of official authority and purpose is necessary. Phelps v. McAdoo, 94 N. Y. S. 265, 47 Misc. 524.

64. 2 Hale, P. C. 151; Samuel v. Payne, 1 Doug. 359; Entick v. Carrington, 2 Wils. 275, 284; Ratcliffe v. Burton, 3 B. & P. 223, 228. The demand is necessary only when there is some person present, on whom it can be made. Androscoggin Rld. v. Richards, 41 Me. 233.

65. Price v. Messenger, 2 B. & P. 158; Bell v. Oakley, 2 M. & S. 259, 261; Entick v. Carrington, 2 Wils. 275, 291, 292. Warrant must show cause and require officer to bring before justice who issued it, person in possession and also the goods. Earley v. P., 117 Ill. Ap. 108.

66. Stone v. Dana, 5 Met. 98; Gray v. Davis, 27 Conn. 447.

67. Crozier v. Cundy, 9 D. & R. 224, 226. And see S. v. Brennan's Liquors, 25 Conn. 278. Taking articles found on a search of defendant by invitation is not illegal though not mentioned in warrant. Com. v. Tucker, 189 Mass. 457, 76 N. E. 127.

68. C. v. Intoxicating Liquors, 140 Mass. 287, 3 N. E. 4. No more than one place can be named. S. v. Duane, 100 Me. 447, 62 A. 80.

the officer cannot search a house which he owns and another occupies;[69] nor, it has been held, can an adjoining barn be included in the search.[70] But in reason, if the barn is such as in law to be a part of the dwelling-house, and there is nothing in the warrant to indicate that only the actual habitation is meant, the result should be otherwise.[71]

2. **Arresting.**—The warrant generally commands the officer, if he finds the goods, to bring also a person named in it;[72] and this part should be obeyed as well as the other.[73] The Missouri statute contemplates warrants for search and arrest.[74]

IX. *Seizing Goods in other Arrests of the Person.*

§ 210. 1. **Keep and Search—Seize what.**—the officer should safely keep an arrested prisoner until lawfully discharged; and if from violent conduct or other reason he fears an attempt to escape, he may search the person and take away any implements helpful therein.[74a] But this right is limited; for example, it does not exist where the arrest is for mere disorderly drunkenness, and it is submitted to, and there is no ground to fear an attempt at escape.[75] Again,—

2. **Money and Other Valuables.**—In the absence of any special reason, the officer should not take anything from the prisoner's custody:[76] for example, money, "unless it be in some way connected with the charge or proof against him, as he is thereby deprived of the means of making his

69. McGlinchy v. Barrows, 41 Me. 74. And see Flaherty v. Longley, 62 Me. 420.

70. Jones v. Fletcher, 41 Me. 254, 256.

71. Stat. Crimes, § 278. In searching the officers must do no injury to property not absolutely necessary and if they do, are liable. Buckley v. Beaulien, 104 Me. 56, 71 A. 70.

72. Burn Just. "Search-warrants;" 1 Chit. Crim. Law, 66; post, § 218.

73. Stone v. Dana, 5 Met. 98.

74. Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. 322.

74a. Gisske v. Landers, 9 Cal. Ap. 13, 98 P. 43.

75. Leigh v. Cole, 6 Cox C. C. 329. Search on arrest without warrant illegal when accused is innocent. Regan v. Harkey (Tex. Cr Ap. 1905), 87 S. W. 1164. Search for concealed weapons. Keady v. P. (Colo. 1903), 74 P. 892. Without a warrant. North v. P., 139 Ill. 81, 28 N. E. 866.

76. Reg. v. Johnson, 11 Mod. 62.

defence." [77] Nor should the watch of one apprehended for rape be taken; and where it was, the court ordered its restoration.[78] But—

§ 211. 1. **Bounds of Doctrine.**—The arresting officer ought to consider the nature of the acousattion; then if he finds on the prisoner's person, or otherwise in his possession, either goods or money which he reasonably believes to be connected with the supposed crime, as its fruits, or as the instruments with which it was committed, or as supplying proofs relating to the transacttion, he may take and hold them to be disposed of as the court directs.[79] And discoveries made in this lawful search may be shown at the trial in evidence; as, marks and scars on the prisoner's person; [80] and if there are tracks supposed to be his, the officer may require him to put his feet into them, or to take off his boots to be compared with them, the result to appear in evidence at the trial.[81]

2. **Statutes**—in some of the States confirm or extend this authority. Where, on arrest for larceny, the officer was by the statute directed to "seize and secure the money, goods, or other articles alleged to be stolen, which shall be found in

77. 1 Hayes Dig. 70, referring to Rex v. Jones, 6 Car. & P. 343, 25 E. C. L. 465; Rex v. O'Donnell, 7 Car. & P. 138, 32 E. C. L. 39; Rex v. Kinsey, 7 Car. & P. 447, 32 E. C. L. 700; Reg. v. Frost, 9 Car. & P. 129; Stuart v. Harris, 69 Ill. Ap. 668; Holker v. Hennessy, 141 Mo. 527, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. 524; Ex parte Hurn., 92 Ala. 102, 9 So. 315; Hubbard v. Garner, 115 Mich. 406, 73 N. W. 390; Rex v. Burgiss, 7 C. & P. 488; compare as to taking money which may be used to furnish a means of escape. Commercial Ex. Bank v. McLeod, 65 Iowa, 665, 19 N. W. 329, 22 N. W. 919.

78. Rex v. Kinsey, supra.

79. Dillon v. O'Brien, 16 Cox, C. C. 245; Woolfolk v. S., 81 Ga. 551, 8 S. E. 724; Ex parte Hurn, 92 Ala. 102, 25 Am. St. 23, 9 So. 515; Getchell v. Page, 103 Me. 387, 69 A. 624; Smith v. Jerome, 93 N. Y. S. 202, 47 Misc. 22; P. v. Beach (Colo. 1911), 113 P. 513; Thatcher v. Weeks, 79 Me. 547, 11 A. 599; Spalding v. Preston, 21 Vt. 9, 50 Am. D. 68; Newman v. P., 23 Colo. 300, 47 P. 278; S. v. Hassan, 149 Iowa 518, 128 N. W. 960.

80. O'Brien v. S., 125 Ind. 38, 25 N. E. 137. Papers taken without warrant are received in evidence. P. v. Campbell, 160 Mich. 108; 16 Det. Leg. N. 1082, 125 N. W. 42.

81. S. v. Graham, 74 N. C. 646, 21 Am. R. 493; Walker v. S., 7 Tex. Ap. 245, 32 Am. R. 595.

the possession of such accused person, or which shall be waived by him in flying from justice," it was held that the shop of the prisoner might be broken open and the stolen goods taken thence.[82]

§ 212. **The Things taken**—remain the prisoner's property.[83] The officer, for example, cannot appropriate such money to pay the expense of conveying him to prison.[84] He holds all, whether money or goods, subject to the order of the court; which in proper circumstances will direct him to restore the whole or a part to the prisoner. This power is exercised both in cases where the original taking was wrongful, and where for any other reason there ought to be a partial or complete returning of the thing.[85] Where a city marshal took a drum from one arrested for beating it contrary to a by-law, then after the trial retained it to prevent a repetition of the beating, he was held to be liable to the owner in trover.[86]

X. *The Disposal of the Arrested Person and Goods.*

§ 213. **A Private Person,**—who without a warrant has arrested another for treason or felony, has his election to

82. Banks v. Farwell, 21 Pick. 156. See also Peters v. S., 9 Ga. 109; Rex v. Amey, Russ. & Ry. 500.

83. Rickers v. Simcox, 1 Utah, 33; Ex parte Craig, 4 Wash. C. C. 710; Holker v. Hennessy, 141 Mo. 527, 42 S. W. 1090, 39 L. R. A. 165, 64 Am. St. 524; Commercial Exch. Bank v. McLeod, 65 Iowa, 665, 19 N. W. 329, 22 N. W. 919; Southern H. v. S. Co. v. Lester, 166 Ala. 86, 52 So. 328.

84. Reg. v. Bass, 2 Car. & K. 822, 61 E. C. L. 822. See Reg. v. Roberts, Law Rep., 9 Q. B. 77, 12 Cox, C. C. 574.

85. Reg. v. Bass, supra; Rex v. Burgiss, 7 Car. & P. 488; Rex v. Barnett, 8 Car. & P. 600; Ex parte Craig, 4 Wash. C. C. 710, 6 Fed. Cas. 3321. See Reg. v. Pierce, 6 Cox, C. C. 117; Bullock v. Dunlap, 2 Ex. D. 43. More, in confirmation of the doctrines of the sub-title, may be found in Reg. v. McKay, 3 Crawf. & Dix. C. C. 205; Rex v. O'Donnell, 7 Car. & P. 138; Rex v. Burgiss, 7 Car. & P. 488; Spalding v. Preston, 21 Vt. 9, 50 Am. D. 68; ante, § 208. If the charge is the stealing of a horse, and the prisoner has the horse with him, the officer ought not to take away money from his person. Rex v. Jones, 6 Car. & P. 343. He may take stolen property from the prisoner's possession other than on his person. Houghton v. Bachman, 47 Barb. 388; U. S. v. Wilson, 163 Fed. 338.

86. Thatcher v. Weeks, 79 Me. 547, 11 A. 599.

take him immediately before a magistrate [86a] who will bind him over to the higher court, or deliver him to the proper police officer, or to the jailer at the jail.[87] If the arrest is for affray in the arresting person's presence, he may keep him till the heat is over, then transfer him to the constable; [88] or doubtless dispose of him otherwise in like manner as for treason or felony.[89] He must not retain the custody an unreasonable time.[90]

§ 214. 1. **An Officer,**—who without a warrant has made an arrest for an affray, may likewise keep his prisoner till the heat is over; and, says Chitty.[91] whatever the offence, "a constable may convey him to the sheriff or jailer[92] of the county or franschise; but the safest and best course is said to be, in all cases, to carry the offender before a justice of the peace, as soon as circumstances will permit." [93]

Where the arrest is on suspicion of treason or felony, the officer must take his prisoner "before a justice to be examined, as soon as he reasonably can." He may be handcuffed when necessary to prevent an escape.[94] In some of our States, the time of detention is regulated by statutes.

86a. Johnson v. Collins, 28 Ky. L. 375, 89 S. W. 253.

87. 1 Chit. Crim. Law, 20, referring to 1 Hale, P. C. 589; 2 Ib., 77, 81; 2 Hawk., P. C., c. 13, § 7, and c. 16, § 3; Rowe v. London Pianoforte Co., 13 Cox, C. C., 211.

88. Chit. Crim. Law, ut sup.; referring to 2 Hawk., P. C., c. 13, § 8.

89. See the observations of Gibson, J., in C. v. Deacon, 8 S. & R. 47.

90. Habersham v. S., 56 Ga. 61; Potter v. Swindle, 77 Ga. 419, 3 S. E. 94; Ocean Steamship Co. v. Williams, 69 Ga. 251; Rutledge v. Rowland, 161 Ala. 114, 49 So. 461.

91. 1 Chit. Crim. Law, 23, 24.

92. It is his duty to receive the arrested person. McCullough v. C., 67 Pa. 30.

93. 2 Hale, P. C., 95, etc. See Arnold v. Steeves, 10 Wend. 514; Moses v. S., 6 Ga. Ap. 251, 64 S. E. 699; Hill v. Smith, 107 Va. 848, 59 N. E. 475; Tubbs v. Tukey, 3 Cush. 438, 50 Am. D. 744. By statute in Kentucky. Johnson v. Collins, 28 Ky. L. 35, 89 S. W. 253. He may be placed in the custody of the magistrate by the arresting officer. Meyers v. Dunn, 31 Ky. L. 926, 104 S. W. 352.

94. Wright v. Court, 6 D. & R. 623, 4 B. & C. 596; Firestone v. Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. 266; Dehn v. Hinman, 56 Conn. 320, 15 A. 741. See also Wheeler v. Nesbitt, 24 How. U. S. 544. See Handcuffing, as to handcuffing, ante, § 163 (1). And see Ex parte Taws, 2 Wash. C. C. 353; Leigh v. Cole, 6 Cox, C. C. 329. See

2. **Discharging without further Steps.**—There are circumstances, therefore, in which an officer (or a private person [95]) who has lawfully arrested one without a warrant, not only may, but should, release him without taking him before a magistrate. If on a fresh inquiry the reason on which the arrest was made appears unfounded, or if from any other cause the law is powless to punish him, he should at once be set at liberty.[96] Again, in principle, a prisoner who has consented to his own discharge, though unlawfully granted by the officer, acquires against the latter no rights which he would not have if he had been taken before a magistrate. Where the arrest is under a warrant, the rule is, we have seen,[97] different; for the officer must obey its commands, and return his doings thereon to the magistrate or court. And a statute, authorizing or requiring an arrest without a warrant, may in a certain sense stand in the place of a warrant;[98] or in terms it may require, like, like a warrant, the taking of the arrested person before a court or magistrate, therefore making this further step necessary for the officer's justification.[99] But even on such a statute, the arrested person may waive his rights as the condition of his discharge.[1]

§ 215. **A. Watchman,**—"having apprehended a party, may discharge himself from liability for an escape, by de-

also, S. v. Whitfield, 109 N. Car. 876, 877, 13 S. E. 726; Hathaway v. Com., 26 Ky. L. 630, 82 S. W. 400; U. S. v. Nardello, 4 Mackey (D. C.) 503; Dunmore v. S., 86 Miss. 788, 39 So. 69; S. v. Rogers, 112 N. Car. 874, 17 S. E. 297.

95. Habersham v. S., 56 Ga. 61.

96. 2 Hale, P. C. 95; Cowles v. Dunbar, 2 Car. & P. 565; McDonald v. Rooke, 2 Bing. N. C. 217, 2 Scott, 359. And see Simmons v. Milligen, 2 C. B. 524. In S. v. Clausmeir, 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73, 77 Am. St. 511, it was held that a sheriff may take a photograph of a prisoner in his custody and his name, residence and place of birth if without personal violence to prisoner.

97. Ante, § 187.

98. Warner v. Grace, 14 Minn. 487.

99. Papineau v. Bacon, 110 Mass. 319; Brock v. Stimson, 108 Mass. 520, 11 Am. R. 390; Gainey v. Parkman, 100 Mass. 316. See C. v. Tobin, 108 Mass. 426; Mason v. Lothrop, 7 Gray, 354; Kennedy v. Favor, 14 Gray, 200; S. v. Parker, 75 N. C. 249; Weston v. Carr, 71 Me. 356.

1. Joyce v. Parkhurst, 150 Mass. 243, 22 N. E. 899; Caffrey v. Drugan, 144 Mass. 294, 11 N. E. 96.

livering him to a constable, or he may himself take him before a magistrate."[2] But the duties of watchmen are generally in our States defined by the statutes.

§ 216. **In Arrests by Warrant,**—the officer should as soon as possible "bring the party to the jail or to the justice, according to the import of the warrant."[3] In some localities, the justice must be the one who issued it;[4] in others, any magistrate within the jurisdiction will suffice.[5] The officer must, on this subject,[6] follow the law or the warrant. If the command is to bring the prisoner before the one magistrate or the other, the right to elect is in the officer.[7] Any unnecessary delay is a breach of duty;[8] "but if the time be unseasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a rescue, or the party be ill and unable at present to be brought, he may, as the case shall require, secure him in the stocks; or, in case the quality of the prisoner or his indisposition so require, detain him in a house till the next day, or until it may be reasonable to bring him."[9] Instead of the stocks, there are generally in our States places of temporary security in which prisoners may be locked up till they can be conveniently taken before the magistrate or to jail.

§ 217. **While the Prisoner is before the Magistrate,**—he is in law still in the custody of the officer,[10] "until he has

2. 1 Chit. Crim. Law, 24; Dalt. Just., c. 104.

3. 1 Chit. Crim. Law, 59; Firestone v. Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. 266.

4. P. v. Fuller, 17 Wen. 211; Batchelder v. Currier, 45 N. H. 460; Wright v. Templeton, 80 Vt. 358, 67 A. 817 (who may take proof or hold for examination).

5. C. v. Wilcox, 1 Cush. 503; Ex parte Branigan, 19 Cal. 133.

6. Stetson v. Packer, 7 Cush. 562.

7. Foster's Case, 5 Co. 59a.

8. Reg. v. Derby, Fort. 140, 143; 2 Hale P. C. 119. An officer who has arrested one at a distance from the jail, may judge of the time to start for it, and the state of the weather in which he will go. The limit of the right is that he must not needlessly expose the prisoner's health, or do him a personal injury. Butler v. Washburn, 5 Fost. N. H. 251.

9. 2 Hale P. C. 95, 96, 119, 120.

10. 2 Hale P. C. 120; C. v. Morihan, 4 Allen, 585. See post, § 952a.

been either discharged, bailed, or committed to prison. The officer may keep his warrant for his own justification, and need only return to the justice what he has done in pursuance of his commands." [11]

§ 218. **On Search-warrant.**—"If on the return before the justice," says Chitty, "it appear that the goods were not stolen, they are to be restored to the possessor. If it appear they were stolen, they are not to be delivered to the proprieteor, but deposited in the hand of the sheriff or constable, in order that the party robbed may proceed, by indicting and convicting the offender, to have restitution. The party who had the custody of the goods is to be discharged if they were not stolen; and if they were, not by him but by another person who sold or delivered them to him, and it appear that he was ignorant of the mode in which they were procured, he may be discharged, but bound over to give evidence as a witness against him that sold them. If it appear that he knew them to be stolen, then he should be bound to answer the felony; for there is a probable cause of suspicion, at least that he was accessory after the fact." [12]

11. 1 Chit. Crim. Law, 60, referring to Reg. v. Wyatt, 2 Ld. Raym. 1189, 1196; Dick. Just. Arrest, IV As to the officer's return, see also ante, § 187 (3).

12. 1 Chit. Crim. Law, 67; 2 Hale P. C. 151, 152.

CHAPTER XIV.

FLED FROM JUSTICE, EXTRADITION.

Consult—the chapters on Jurisdiction in New Crim. Law, I, §§ 99-203.

§ 219. 1. **Without a Special Law,**—no one can be arrested or forcibly carried into another State or country to answer for a crime committed therein.[13] But our national Constitution and our treaties have furnished provisions for this, now to be explained.

2. **How Chapter divided.**—We shall consider, I. As between the States; II. As between States, United States, and Territories; III Under Treaties with Foreign Nations; IV. Further of Unlawful Seizures and both Surrenders.

I. *As between the States.*

§ 220. 1. **By our National Constitution,**—"A person charged in any State [13a] with treason, felony, or other crime, who shall flee from justice and be found in another State,

13. New Crim. Law, I, § 135; Tarvers v. S., 90 Tenn. 485, 16 S. W. 1041; Reg. v. Tubbee, 1 Rob. Pract. Rep. U. C. 98; Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166. Law of nations imposes no obligation to return a fugitive accused of crime. Ex parte McCabe, 46 Fed. 589, 12 L. R. A. 589; In re Cook, 49 Fed. 833.

13a. Includes Porto Rico. P. v. Bingham, 211 U. S. 468, 29 S. Ct. 190. As to Alaska. Gillis v. Leekley, 38 Wash. 156, 80 P. 300. Indian Territory. Ex parte Dickson, 4 Ind. T. 481, 69 S. W. 943. District of Columbia. Hayes v. Palmer, 21 A. D. C. 450. "Charged with crime" includes one charged before a magistrate. In re Strauss, 197 U. S. 324, 25 S. Ct. 535, 49 L. Ed. 774; charge continues until acquittal or conviction and sentence. Hughes v. Pflanz, 71 C. C. A. 234, 137 Fed. 980.

shall, on demand of the executive authority of the State from which he fled, be delivered up and be removed to the State having jurisdiction of the crime."[14]

2. **"Crime."**—There were formerly differences of opinion as to the meaning of the word "crime" in this constitutional provision. Thus, being connected with "treason" and "felony," some interpreted it as limited to offences of a similar nature.[15] It was readily conceded to extend to statutory as well as common law crimes.[16] The word in its proper and full meaning includes whatever is pursuable by indictment or other like proceeding on behalf of the State, the object whereof is punishment.[17] And such is by the Supreme Court of the United States settled to be the meaning in this place; the reason of its being connected with "treason" and "felony" was deemed to be to exclude the possible construction that political offenders were not to be surrendered the same as others.[18] If the wrong was a crime in the State where committed, it need not be also in that of the surrender.[19]

3. **A Fleeing from Justice,**—within this provision, implies a crime committed in the State making the demand,[20] by one who afterward "shall flee" to the other State;[21] yet the fleeing is constituted by any going away either with or without the intent to elude justice,[22] and though simply

14. Const. U. S., art. 4, § 2; Mahon v. Justice, 127 U. S. 700, 8 S. Ct. 1204.

15. In re Greenough, 31 Vt. 279; P. v. Warden, etc., 112 N. Y. S. 492, 60 Misc. 525. As to the rule see Stat. Crimes, §§ 245-248.

16. In re Greenough, supra; In re Fetter, 3 Zab. 311, 57 Am. D. 382; In re Clark, 9 Wend. 212; In re Hughes, Phillips, N. C. 57.

17. New Crim. Law, I, §§ 32, 623, 624.

18. Kentucky v. Dennison, 24 How. U. S. 66, 99, 103; Ex parte Reggel, 114 U. S. 642, 5 S. Ct. 1148. The State courts now yield to this view. P. v. Brady, 56 N. Y. 182, 188; Brown's Case, 112 Mass. 409, 17 Am. R. 114; P. v. Cross, 135 N. Y. 536, 31 Am. St. 850; Morton v. Skinner, 48 Ind. 123, and the authorities there referred to.

19. Johnston v. Riley, 13 Ga. 97; In re Voorhees, 3 Vroom. 141; Wilcox v. Nolze, 34 Ohio St. 520, 524.

20. Ex parte Smith, 3 McLean, 121; Ex parte Hoffstot, 180 F. 240; aff'd 218 U. S. 665, 31 S. Ct. 222, 54 L. Ed. 1201; O'Malley v. Quigg, 172 Ind. 350, 88 N. E. 611.

21. In re Heyward, 1 Sandf. 701, 708.

22. Roberts v. Reilly, 116 U. S. 80, 97, 6 S. C. 291; Ex parte Brown, 28 Fed. 653; S. v. Richter, 37 Minn.

to the doer's own home.[23] Hence if one commits a crime in a State in which he is not personally present, as in various circumstances he may,[24] there is no means by which he can be transferred, against his will, to the place of its commission to be tried.[25]

4. **After Conviction,**—the same as before, the offender escaping to another State may under this constitutional provision be brought back.[26]

§ 221. 1. **Statutes of the United States**—regulate the proceedings. The executive authority of the one State makes on that of the other a demand for the surrender, supported by "a copy of an indictment found, or an affidavit made before a magistrate, etc., charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State, etc., from whence the person so charged has fled." Thereupon the governor applied to must cause the fugitive to be arrested and delivered to the agent of the other.[27] This has been the provision ever since 1793, when it was originally enacted.[28] But—

2. **Compelling State Officers.**—It is contrary to the common course for an act of Congress thus to impose a duty on

436, 35 N. W. 9, 124-7; Ex parte Sheldon, 34 Ohio St. 319; Ex parte Hoffstot, supra; Taylor v. Wise (Iowa, 1910), 126 N. W. 1126; S. v. Gerber (Minn. 1910), 126 N. W. 482; Ex parte Coleman, 53 Tex. Cr. 93, 113 S. W. 17; Bassing v. Cady, 208 U. S. 386, 28 S. Ct. 392; Com. v. Hare, 36 Pa. Super. Ct. 125.

23. Kingsbury's Case, 106 Mass. 223; In re Voorhees, 3 Vroom, 141; In re Roberts, 24 Fed. 132. See In re Manchester, 5 Cal. 237; Degant v. Michael, 2 Ind. 396; and, as to "fleeing from justice" within statutes of limitation. U. S. v. O'Brian, 3 Dil. 381; U. S. v. Smith, 4 Day, 121.

24. Ante, § 53.

25. Wilcox v. Nolze, supra; In re Mohr, 73 Ala. 503, 49 Am. R. 63, 67; Hyatt v. P., 188 U. S. 691, 23 S. Ct. 456, 47 Law Ed. 657. See S. v. Chapin, 17 Ark. 561, 65 Am. D. 452.

26. In re Hope, 10 N. Y. Supp. 28; Ex parte Bergman (Tex.), 130 S. W. 174; Drinkall v. Spiegel, 68 Conn. 441, 36 A. 830, 36 L. R. A. 486.

27. R. S. of U. S., §§ 5278, 5279. He has no discretion. Ex parte Coleman, 53 Tex. Cr. 93, 113 S. W. 93.

28. 1 Stats. at Large, 302; Kentucky v. Dennison, 24 How. (U. S.) 66; Marbles v. Creecy, 215 U. S. 63, 30 S. Ct. 32; In re Opinions of Justices, 201 Mass. 609, 89 N. E. 174.

an officer of a State; when it does, he can obey or not as he chooses, unless his State forbids.[29] Therefore no department of our national government can compel a State governor to surrender the fugitive.[30] Hitherto this voluntary duty has been freely discharged, yet necessarily according to the views of the governor on whom the demand was made, which in some instances have differed from those of the other. At the same time, it is the constitutional duty of the State to make the surrender.[31] Still,—

3. **Constitutional.**—Awkward as it is to require what cannot be compelled, this statute is held to be constitutional.[32]

§ 222. 1. **The Steps**—under it should be distinguished from those to the same end under State laws. The principal ones are—

2. **Affidavit or Indictment.**—An affidavit, to be ground for the requisition, need not contain all the mere formalities of an indictment.[33] The governor of the requesting State is the sole judge of its authenticity.[34] There can be no surrender without either affidavit or indictment;[35] or, what

29. Prigg v. Pennsylvania, 16 Pet. 539.

30. Kentucky v. Dennison, supra.

31. S. v. Hall, 40 Kan. 338, 10 Am. St. 200, 19 P. 918.

32. Jones v. Van Zandt, 5 How. (U. S.) 215; Com. v. Hare, 36 Pa. Super. Ct. 125.

33. In re Manchester, 5 Cal. 237. See Peo. v. Warden etc., 112 N. Y. S. 492, 60 M'sc. 525. As to residence of the person charged. S. v. Clough, 71 N. H. 594, 53 A. 1086, 67 L. R. A. 946, affirmed in Munsey v. Clough, 196 U. S. 364, 25 S. Ct. 282, 46 Law. Ed. 515; see also, Webb v. York, 25 C. C. A. 133, 79 Fed. 616. An indictment may not be required. In re Strauss, 63 C. C. A. 99, 126 Fed. 327; P. v. Stockwell, 135 Mich. 341, 10 Dit. Leg. N. 805, 97 N. W. 765. As to mode of charging the crime. S. v. Goss, 66 Minn. 291, 68 N. W. 1080; P. v. Police Comrs., 91 N. Y. S. 760, 100 Am. D. 483; Jackson v. Archibald, 12 Ohio Cir. 155, 5 O. C. D. 533; In re Renshaw, 18 S. D. 32, 99 N. W. 83, 112 Am. St. 778.

34. Kurtz v. S., 22 Fla. 36, 1 Am. St. 173. The documents going with the requisition must be certified as authentic by the governor of the state from whence the person has fled. Kingsbury's Case, 106 Mass. 223; S. v. Goss, 66 Minn. 291, 68 N. W. 1089; P. v. Donohue, 84 N. Y. 438; Ex parte Powell, 20 Fla. 806.

35. Ex parte Powell, 20 Fla. 806; S. v. Richardson, 34 Minn. 115; Ex parte Spears, 88 Cal. 640, 22 Am.

suffices as a substitute, an information.[36] And whether the one or the other, the accusation must be direct, of a full and complete offence[37] committed in the State.[38] A charge on "information and belief" is not sufficient.[39] Where the accusation is by indictment, if it contains the substantial averments, it need not otherwise conform to the ordinary technical rules of criminal pleading.[40] There is no need that a warrant of arrest, on the affidavit or indictment, should have issued.[41]

3. **Requisition.**—The governor of the State of the offence, being satisfied that the person accused has fled to the particular other State, and that the affidavit or indictment is genuine,[42] certifies to a copy of it[43] as the statute directs,

St. 341, 26 P. 608; Compton v. Alabama, 214 U. S. 1, 29 S. Ct. 605; Pierce v. Creecy, 210 U. S. 387, 28 S. Ct. 714.

36. In re Hooper, 52 Wis. 699, 58 N. W. 741. Contra, Ex parte Bergman (Tex.), 130 S. W. 174 and see Morrison v. Dwyer (Iowa, 1909), 125 N. W. 1064.

37. In re Greenough, 31 Vt. 279; P. v. Brady, 56 N. Y. 182; Smith v. S., 21 Neb. 552, 32 N. W. 594. See Taylor v. Wise (Iowa, 1910), 126 N. W. 1126; Hayes v. Palmer, 21 App. Dc. 450; S. v. Goss, 66 Minn. 291, 68 N. W. 1089.

38. In re Fetter, 3 Zab. 311, 57 Am. D. 382; Ex parte Smith, 3 McLean, 121; In re Heyward, 1 Sandf. 701; In re Leland, 7 Abb. Pr., n. s. 64. See Davis's Case, 122 Mass. 324.

39. Ex parte Cheatham, 50 Tex. Cr. 51, 95 S. W. 1077; Ex parte Smith, 3 McLean C. C. (U. S.) 121, 137, 29 Fed. Cas. 12968; Ex parte Morgan, 20 Fed. 298, 307; Morrison v. Dwyer (Iowa 1909), 121 N. W. 1064.

40. In re Roberts, 24 Fed. 132; P. v. Byrnes, 33 Hun, 98. The indictment should be properly authenticated and should show the accused was charged with a definite crime. Jackson v. Archibald, 12 Ohio Cir. Ct. 155; Davis's Case, 122 Mass. 324, 329; In re Greenough, 31 Vt. 279; S. v. O'Connor, 38 Minn. 243, 36 N. W. 462; In re Voorhees, 32 N. J. L. 141; Roberts v. Reilly, 116 U. S. 80, 29 L. Ed. 544, 6 S. Ct. 291; Ex parte Reggel, 114 U. S. 642, 651, 29 L. Ed. 250, 5 S. Ct. 1148; Hayes v. Palmer, 21 App. D. C. 450; Ex parte Pierce, 155 Fed. 663.

41. Tullis v. Fleming, 69 Ind. 15.

42. In re Manchester, 5 Cal. 237. See Davis's Case, 122 Mass. 324.

43. Kurtz v. S., 22 Fla. 36, 1 Am. St. 173; Kingsbury's Case, 106 Mass. 223. Person demanded has no right to a hearing by governor as to crime and flight. Munsey v. Clough, 196 U. S. 364, 25 S. Ct. 282, 49 L. Ed. 515; affirming S. v. Clough, 71 N. H. 594, 67 L. R. A. 946, 53 A. 1086; Idem, 72 N. H. 178, 67 L. R. A. 946, 55 A. 554; Farrell v. Hawley, 78 Conn. 150, 61 A. 502, 112 Am. St. 98. The governor must determine

and appoints an agent to receive the offender when arrested. Thereupon,—

4. **Warrant of Arrest.**—The governor of the State where the fugitive is, receiving the papers thus described, and finding them in due form, issues as of course, on it being shown that the person accused is a fugitive in his State,[44] his warrant of arrest, the duty being ministerial.[45] There is no unvarying form for such warrant; but by its recitals, by the attaching of requisition papers, or other proper means, it should show on its face that the case is within the law, and otherwise constitute a *prima facie* authority to the arresting officer.[46] There is no need to accompany it by the copy of the affidavit or indictment;[47] nor, if, as it should, it sets out the offence[48] and the requisition,[49] need it describe them formally, but general terms will suffice.[50] It ought properly to be under the great seal of the State (whether the seal is necessary in all the States we need not here inquire); and, in Missouri, where the impression of the seal was unintelligible, the warrant was adjudged void.[51]

the validity of the papers. This power cannot be delegated. In re Tod., 12 S. D. 386, 47 L. R. A. 566, 76 Am. St. 616, 81 N. W. 637.

44. Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291, where the forms fully appear. In re Jackson, 2 Flip. 183; Ex parte Reggel, 114 U. S. 642, 5 S. Ct. 1148.

45. Kentucky v. Dennison, 24 How. (U. S.) 66; In re Clark, 9 Wend. 212, 219; Hibler v. S., 43 Tex. 197; Johnston v. Riley, 13 Ga. 97; In re Rutter, 7 Abb. Pr., n. s. 67; P. v. Brady, 56 N. Y. 182; Ham v. S., 4 Tex. Ap. 645; Leary's Case, 6 Abb. N. Cas. 43; P. v. Pinkerton, 17 Hun, 199; Ex parte Swearingen, 13 S. C. 74.

46. Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291; Ex parte Stanley, 25 Tex. Ap. 372, 8 Am. St. 440, 8 S. W. 645; P. v. Donohue, 84 N. Y. 438; In re Hooper, 52 Wis. 699, 58 N. W. 741; P. v. Pinkerton, 77 N. Y. 245; Leary's Case, 6 Abb. N. Cas. 43; Ex parte Swearingen, supra; P. v. Police Comr., 100 Ap. D. 483, 91 N. Y. S. 760; Ex parte Edwards (Miss. 1905), 44 So. 827. See as to recitals in warrant. S. v. Clough, 71 N. H. 594, 67 L. R. A. 596; affirmed 196 U. S. 364, 25 S. Ct. 282, 49 L. Ed. 515.

47. Nichols v. Cornelius, 7 Ind. 611.

48. Ex parte Cubreth, 49 Cal. 435.

49. Ex parte Thornton, 9 Tex. 635.

50. Kingsbury's Case, 106 Mass. 223; In re Clark, supra; In re Brown, 112 Mass. 409, 17 Am. 114.

51. Vallad v. St. Louis, 2 Mo. 26.

5. **The Agent**—to transmit the fugitive is protected, though there is a defect in the warrant of arrest; for with that he has nothing to do.[52] If he withdraws the requisition and declines to receive the fugive, he will be presumed to represent his principal therein.[53]

§ **223.** 1. **Arrests under State Authority.**—Our constitutional provision binds the several States and the officers of each, the same as though it were in the Constitution of the State. Therefore each State may have its own statutes, and most of them do, to assist and direct the officers in the performance of this constitutional duty,[54] yet not in a way contravening the act of Congress,[55] but furnishing minuter directions and auxiliary helps.[56] Some cases, explanatory of State statutes, are referred to in a note.[57] Thus,—

2. **Before Requisition.**—The act of Congress provides for no steps in the State to which the fugitive has fled, until a requisition has been made by the governor of that of the offence;[58] but some of the State statutes authorize, without this preliminary, the arrest of the fugitive and holding him to await a requisition, while others do not, or

52. Johnston v. Vanamringe, 5 Blackf. 311. See C. v. Hall, 9 Gray, 262, 69 Am. D. 285. As to his duty to bring the fugitive before the governor, see Puttus v. S., 42 Ga. 358.

53. In re Troutman, 4 Zab. 634. See C. v. Hall, 9 Gray, 262.

54. Hibler v. S., 43 Tex. 197, 203; C. v. Hall, 9 Gray, 262, 69 Am. D. 285; In re Mohr, 73 Ala. 503, 49 Am. R. 63; Kingsbury's Case, 106 Mass. 223; Ex parte Ammons, 34 Ohio St. 518; Kurtz v. S., 22 Fla. 36, 1 Am. St. 173; In re Roberts, 24 Fed. 132; Hartman v. Aveline, 63 Ind. 344, 30 Am. R. 217; S. v. Hall, 40 Kan. 338, 10 Am. St. 200, 19 P. 918.

55. Prigg v. Pennsylvania, 16 Pet. 539.

56. C. v. Tracy, 5 Met. 536, 550; Ex parte Rosenblat, 51 Cal. 285; Robinson v. Flanders, 29 Ind. 10; Ex parte Cubreth, 49 Cal. 435; C. v. Hall, 9 Gray, 262, 69 Am. D. 285; Kurtz v. S., 22 Fla. 36, 1 Am. St. 173.

57. The cases in the last note, and C. v. Jailer, 1 Grant (Pa.), 218; Degant v. Michael, 2 Ind. 396; S. v. Hufford, 28 Iowa, 391; Ex parte White, 49 Cal. 433; S. v. Swope, 72 Mo. 399; Sheldon v. McKnight, 34 Ohio St. 316; Work v. Corrington, 34 Ohio St. 64, 32 Am. R. 345.

58. P. v. Brady, 56 N. Y. 182; Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166.

provide an intermediate course.[59] In some of the States, such preliminary steps are permissible without the aid of a statute.[60]

§ 223 a. **Review on Habeas Corpus.**—The alleged fugitive can be taken from the State only on proceedings regular in form. So that any competent State or national court may revise them on *habeas corpus*, and, if they are defective, discharge him.[61] But the question of actual or even probable guilt will not be inquired into;[62] nor will the formal sufficiency of the indictment, if it substantially charges a crime.[63]

II. *As between States, United States, and Territories.*

§ 223 b. 1. **Offences against United States.**—Our general government has a local jurisdiction in the States;[64]

59. Ex parte Rosenblat, 51 Cal. 285; Ex parte White, 49 Cal. 433; Ex parte Cubreth, 49 Cal. 435; In re Rutter, 7 Abb. Pr., n. s., 67; Ex parte Pfitzer, 28 Ind. 450; S. v. Hufford, 28 Iowa, 319; Lavina v. S., 63 Ga. 513.

60. In re Fetter, 3 Zab. 311, 319, 320, 57 Am. D. 382; S. v. Howell, R. M. Charl. 120; S. v. Loper, 2 Ga. Decis. 83; S. v. Buzine, 4 Harring. (Del.) 572; In re Washburn, 4 Johns. Ch. 106; Morrell v. Quarles, 35 Ala. 544. And see P. v. Schenck, 2 Johns. 479.

61. Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291; In re Leary, 10 Ben. 197; Ex parte Brown, 28 Fed. 653; In re Fitton, 45 Fed. 471; Ex parte McKean, 3 Hughes, 23; In re Miles, 52 Vt. 609; In re Robb, 64 Cal. 431, 1 P. 881; Work v. Corrington, 34 Ohio St. 64, 32 Am. R. 345; P. v. Cross, 135 N. Y. 536, 31 Am. St. 850; In re Patterson, 99 N. C. 407, 6 S. E. 643; In re Clark, 9 Wend. 212; In re Heyward, 1 Sandf. 701; Hibler v. S., 43 Tex. 197; In re Manchester, 5 Cal. 237; Ex parte Smith, 3 McLean, 121; Taylor v. Wise (Iowa, 1910), 126 N. W. 1126; Farrell v. Hawley, 78 Conn. 150, 61 A. 502, 112 Am. St. 98; In re Strauss, 63 C. C. A. 99, 126 Fed. 327; Barriere v. S., 142 Ala. 72, 39 So. 55; P. v. Hyatt, 172 N. Y. 176, 60 L. R. A. 774, 92 Am. St. 706; affirmed in 188 U. S. 691, 23 S. Ct. 456, 47 L. Ed. 657; Ex parte Dennison, 72 Neb. 703, 101 N. W. 1045, 117 Am. St. 817, 196 U. S. 795.

62. In re Clark, supra; In re Greenough, 31 Vt. 279; Ex parte Watson, 2 Cal. 59; Ex parte Devine, 74 Miss. 715, 22 So. 3; S. v. Buzine, 4 Harring. (Del.) 572; P. v. Brady, 56 N. Y. 182; Grin v. Shine, 187 U. S. 181, 23 S. Ct. 98, 47 Law Ed. 130 (or whether accused will have a fair trial). Marbles v. Creecy, 215 U. S. 63, 30 St. Ct. 32; S. v. Justus, 87 Minn. 237, 87 N. W. 77, 55 L. R. A. 325.

63. Davis's Case, 122 Mass. 324.

64. New Crim. Law, I, § 156 et seq.

so that it needs no help from a State to arrest one within its limits. And there are statutes providing for the removal for trial of persons from one district to another.[65] There can be no removal for a preliminary examination, the place for which is the district of the arrest.[66] Such examination may be founded on a valid indictment in the other district.[67] But the removal will not be ordered if the indictment is invalid.[68]

2. **Territory.**—The national statute we are considering, broader than the Constitution, yet not in conflict with it, provides for the surrender as between the States and Territories; its words being, "the executive authority of any State or Territory," etc.[69]

III. *Under Treaties with Foreign Nations.*

§ 224. 1. **Statutes in Aid of Treaties.**—Some treaties require statutes to give them effect, others not.[70] Extradition ones are party of the former sort,[71] not fully.[72] Congress has supplied the needed legislation by general provisions, not by a statute for each treaty.[73]

2. **Rules Regulating the Taking of Evidence.**—In foreign extradition taking testimony and examining the accused are conducted according to the law of the state where the proceedings are had. If the accused may by statute testify on his preliminary examination he may in extradition to speak for himself.[1]

65. R. S. of U. S., § 1014; Act of June 22, 1874, Stats. at Large, c. 396; Horner v. U. S., 143 U. S. 207, 12 S. Ct. 407.

66. U. S. v. Shepard, 1 Abb. (U. S.) 431.

67. In re Alexander, 1 Low. 530; U. S. v. Haskins, 3 Saw. 262.

68. In re Buell, 3 Dil. 116. See In re Clark, 2 Ben. 540.

69. R. S. of U. S., § 5278; Ex parte Reggel, 114 U S. 642. And see Ex parte Romanes, 1 Utah, 23; In re Romaine, 23 Cal. 585; U. S. v. Haskins, 3 Saw. 262.

70. Stat. Crimes, § 14.

71. In re Metzger, 1 Barb. 248, 1 Par. Cr. 108.

72. In re Sheazle (British Prisoners), 1 Woodb. & M. 66.

73. R. S. of U. S., § 5270-5277; Act of Aug. 3, 1882, 22 Stats. at Large, 215; Act of March 3, 1883, 22 Stats. at Large, 530.

1. In re Farez, 7 Blatchf. C. C. (U. S.) 345, 8 Fed. Cas. 4645, 40 How. Pr. (N. Y.) 107.

Generally common law criminal procedure does not apply fully to international extradition. The character and form of the evidence are determined by treaties and statutes which are controlling and usually the accused is not entitled to be confronted with the witnesses.[2] Documentary evidence has equal credit and weight with oral testimony.[3]

The federal commissioner should keep a record of oral evidence in a narrative form, and note all objections with the grounds thereof. The party seeking extradition ought to furnish a written translation of all documentary evidence in a foreign language accompanied by an affidavit that it is correct.[4]

The federal statute governing foreign extradition provides that all depositions or papers in which the extradition of an alleged fugitive is required, shall be received as evidence if they shall be legally authenticated so as to entitle them to be received for similar purposes in the Courts of the country whence the accused is alleged to have escaped. The certificate of a diplomatic or consular officer of the United States residing in the foreign country is a sufficient authentication and should be to the effect that the papers "are properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of"—.[5]

Though apparently the statute is mandatory, the certificate may be supplemented by oral evidence. So where the consular certificate lacked material particulars it was permitted to introduce certificates of Court officials of the foreign country that depositions were proper and valid evidence. The oral testimony of a police officer that the depositions attached to the requisition papers had been signed

2. In re DuDgan, 2 Lowell C. C. (U. S.) (Mass. District Court) 367, 7 Fed. Cas. 4120; Pettit v. Walshe, 194 U. S. 205, 48 L. Ed. 938, 24 S. Ct. 657.

3. In re Farez, 7 Blatchf. C. C. (U. S.) 345, 8 Fed. Cas. 4645; Elias v. Ramirez, 215 U. S. 398, 30 S. Ct. 131.

4. In re Henrich, 5 Blatchf. C. C. (U. S.) 414, 425, 12 Fed. Cas. 6369.

5. U. S. R. S., S. 5271; In re Henrich, 5 Blatchf. C. C. (U. S.) 414, 425, 426, 12 Fed. Cas. 6369. See, also, In re Wadge, 16 Fed. Cas. 332, 333.

and sworn to in his presence, that they were original and would be received to show criminality, in the foreign country, was held sufficient.[6]

The burdén of proof to show facts justifying the return of a fugitive from justice is on the person demanding it but he need not produce proof beyond a reasonable doubt. Such evidence both in amount and degree should be produced before the commissioner or magistrate as would justify holding the accused for trial upon his preliminary examination.[7] The question whether accused is a fugitive from justice is to be determined by the Executive of the State where he is found.[8]

An affidavit that accused is a fugitive from justice has been held sufficient.[9] The accused should be permitted to introduce any evidence to show that he is not a fugitive from justice, as for example, proof that he had never been a resident of the state from whence the demand came.[10]

3. **The Interpretation of the Treaties**—is of the like sort.[74]

6. In re Wadge, 15 Fed. 864, 16 Fed. 332, 334, 21 Blatchf. C. C. (U. S.) 300; In re Fowler, 4 Fed. 303, 312, 18 Blatchf. C. C. (U. S.) 430, 437, 438.

7. In re Bryant, 80 Fed. 282, 284; Bryant v. U. S., 167 U. S. 104, 42 L. Ed. 94, 17 S. Ct. 744; In re Farez, 7 Blatchf. C. C. 345, 8 F. Cas. 4645, 40 How. Pr. (N. Y.) 107; In re Henrich, 5 Blatchf. C. C. 414, 425, 12 F. Cas. 6369; In re Doo Woon, 18 F. 898, 899; Ex parte Morgan, 20 Fed. 298, 307; Elias v. Ramirez, 215 U. S. 393, 30 S. Ct. 131; Benson v. McMahon, 127 U. S. 457, 461, 8 S. Ct. 1240, 32 L. Ed. 234.

8. Hess v. Grimes (Kan. 1897), 48 P. 596; Ex parte Reggel, 114 U. S. 642, 652, 29 L. Ed. 250, 5 S. Ct. 1148; In re White, 55 Fed. 54, 57, 5 C. C. A. 29, citing and approving. Roberts v. Reilly, 116 U. S. 80, 29 L. Ed. 544, 6 S. Ct. 291; Dennison v. Christian, 196 U. S. 637, 49 L. Ed. 630, 25 S. Ct. 795.

9. Ex parte Reggel, 114 U. S. 642, 643, 29 L. Ed. 250, 5 S. Ct. 1148.

10. Ex parte Smith (The Mormon Prophet), 3 McLean C. C. (U. S.) 121, 137, 22 Fed. Cas. 12968; In re Cook, 49 Fed. 833; In re Manchester, 5 Cal. 237; Jones v. Leonard, 50 Iowa, 106, 32 Am. 116; Hartman v. Aveline, 63 Ind. 344, 30 Am. 217; Wilcox v. Nolze, 34 Ohio St. 520; In re White, 55 Fed. 54, 58, 5 C. C. A. 29; Hyatt v. N. Y., 188 U. S. 691, 47 L. Ed. 657, 23 S. Ct. 456, aff'g P. v. Hyatt, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. 706, 60 L. R. A. 774.

74. In re Stupp, 11 Blatch. 124; In re Metzger, 1 Barb. 248, 1 Par. Cr. 108; In re Kelley, 2 Low. 339;

4. **On Habeas Corpus Proceedings,**—we have various decisions, some of which are cited in the note.[75]

IV. *Further of Unlawful Seizures and both Surrenders.*

§ 224 a. 1. **Compensation.**—Some questions have arisen concerning the compensation of persons engaged in these surrenders, as to which a mere reference to cases will suffice.[76]

2. **Conflicting Processes.**—If the requisition for the surrender to a sister State finds the person in prison, though on civil process, the effect seems to be, on a question not concluded by any great weight of authority, that it can hold him only when such imprisonment is ended.[77] Should the fugitive be on bail, his surrender on the requisition would operate not quite uniformly, in varying circumstances, upon the liabilities of his sureties,—depending on principles not within these elucidations.[78]

§ 224 b. 1. **One wrongfully brought within a Jurisdiction,**—and there arrested on a civil process, should be dis-

In re Dugan, 2 Low. 367; In re Lagrave, 45 How. Pr. 301, 315; In re Farez, supra; Attorney-General v. Kwok-a-Sing (Law Rep.), 5 P. C. 179, 12 Cox C. C. 565; In re De Giacomo, 12 Blatch. 391; In re Ternan, 9 Cox C. C. 522; Ex parte Windsor, 10 Cox C. C. 118, 6 B. & S. 522; Ex parte Bouvier, 12 Cox C. C. 303, 4 Eng. 550; In re Cortes, 136 U. S. 330; In re Benson, 34 Fed. 649; In re Vandervelpen, 14 Blatch. 137; Benson v. McMahon, 127 U. S. 457, 8 S. Ct. 1240; In re Miller, 23 Fed. 32; U. S. v. Watts, 14 Fed. 130.

75. Benson v. McMahon, 127 U. S. 457, 8 S. Ct. 1240; In re Cortes, 136 U. S. 330; Stevens v. Fuller, 136 U. S. 468, 10 S. Ct. 911; Ex parte Van Aernam, 3 Blatch. 160; In re Henrich, 5 Blatch. 414; In re Macdonnell, 11 Blatch. 79; In re Farez, 7 Blatch. 345, 2 Abb. (U. S.) 346, 40 How. Pr. 107; Ex parte Huguet, 12 Cox C. C. 551, 8 Eng. 595; In re Titus, 8 Ben. 411.

76. Steckman v. Bedford, 84 Pa. 317; Malpass v. Caldwell, 70 N. C. 130; Day v. Townsend, 70 Iowa, 538, 30 N. W. 753; P. v. Columbia, 134 N. Y. 1; Moon v. Butler, 30 Kan. 458, 2 P. 818.

77. In re Troutman, 4 Zab. 634; S. v. Allen, 2 Humph. 258. And see Hackney v. Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. R. 101, or contra by a voluntary surrender. Hess v. Grimes, 5 Kan. Ap. 763, 48 P. 596; waiver of jurisdiction over prisoner if out on bail. P. v. Hugan, 34 Misc. 85, 69 N. Y. S. 475, 15 N. Y. Ct. 346.

78. Taylor v. Taintor, 16 Wal. 366; S. v. Allen, 2 Humph. 258; Ingram v. S., 27 Ala. 17; In re Cannon, 47 Mich. 481, 11 N. W. 280.

charged;[79] "for," says Lord Holt, "no lawful thing founded upon a wrongful act can be supported."[80] This doctrine protects even one enticed into the jurisdiction by fraud;[81] and it protects one whom the creditor has caused to be conveyed into the State by perverting to his private ends the process of interstate extradition for crime.[82] But criminal cases are not within this rule; for in them the State is plaintiff, and in judgment of law it can do no wrong. So, that however one may have been forced or cajoled into a jurisdiction, he can there be held for his crime,—a proposition abundantly settled,[83] though there is some authority adverse.[84] And we have intimations that the sovereign power of a State, whence a citizen has been kidnapped, may rightfully demand his release from criminal process in the other State.[85] From all which it follows that,—

2. **A Fugitive from Justice,**—when by the interstate extradition process he has been returned to the State of his crime, may justly be put on trial for any offence, though not embraced in the requisition. Should he first be sent back, he must still be returned on a fresh requisition; and that would be a vain and idle proceeding.[86] But—

3. **After Surrender under a Treaty,**—the case is different; because, among other reasons, our treaties specify par-

79. Ilsley v. Nichols, 12 Pick. 270, 275, 22 Am. D. 425; Wanzer v. Bright, 52 Ill. 35, 40, 41.

80. Luttin v. Benin, 11 Mod. 50, 51. See also U. S. v. Bridgman, 9 Bis. 221; Byler v. Jones, 79 Mo. 261.

81. Wood v. Wood, 78 Ky. 624; Wanzer v. Bright, 52 Ill. 35.

82. Compton v. Wilder, 40 Ohio St. 130. And see Moletor v. Sinnen, 76 Wis. 308, 20 Am. St. 71, 44 N. W. 1099.

83. New Crim. Law, I, § 135; Mahon v. Justice, 127 U. S. 700, 8 S. Ct. 1204; Ex parte Barker, 87 Ala. 4, 13 Am. St. 17, 6 So. 7; In re Mahon, 34 Fed. 525; Elmore v. S., 45 Ark. 243; S. v. Day, 58 Iowa, 678, 12 N. W. 733; Brookin v. S., 26 Tex. Ap. 121, 9 S. W. 735; Ker v. P., 110 Ill. 627, 51 Am. R. 706; P. v. Rowe, 4 Par. Cr. 253; S. v. Ross, 21 Iowa, 467; Ex parte Moyer, 12 Idaho, 250, 85 P. 897, 118 Am. St. 218; Ex parte Pettibone, 12 Idaho, 164, 85 P. 902; Ex parte Baker, 43 Tex. Cr. 281, 65 S. W. 91, 96 Am. St. 871.

84. In re Robinson, 29 Neb. 135, 26 Am. St. 378, 45 N. W. 267.

85. Dow's Case, 18 Pa. 37, 39; Ex parte Barker, supra.

86. After various conflicting opinions in the State courts and inferior national ones, it has been

ticular offences, and do not, like the constitutional extradition between the States, provide for the giving up of accused persons for any and every crime. Therefore it would be an offence to the surrendering government to hold a person extradited under the treaty for a wrong not specified in the extradition papers, unless such government had consented thereto.[87] Yet formerly, on one ground or another, this doctrine was widely denied;[88] and we have even a case holding that the returned fugitive may be arrested on civil process.[89] But it is now settled by paramount authority, and is universally accepted as the law, that neither the State nor the United States can put an extradited person on trial for any offence not within the treaty, until he has had a reasonable time to return, and probably not for any not within the extradition papers. As to the latter, though the foreign government had in the treaty consented to the extradition and the trial, it may perhaps claim the right to pass upon the question in advance.[90]

so settled by the Supreme Court of the United States. Lascelles v. Georgia, 148 U. S. 537, 13 S. Ct. 687. Some of the other cases to the like effect are S. v. Stewart, 60 Wis. 587, 50 Am. R. 388, 19 N. W. 420; Harland v. Territory, 3 Wash. Ter. 131, 13 P. 453; P. v. Cross, 135 N. Y. 536, 31 Am. St. 850; In re Miles, 52 Vt. 609; Ham v. S., 4 Tex. Ap. 645; C. v. Wright, 158 Mass. 149, 3 N. E. 82. Contra, Ex parte McKnight, 48 Ohio St. 588, 28 N. E. 1034; S. v. Hall, 40 Kan. 338, 10 Am. St. 200, 19 P. 918; In re Cannon, 47 Mich. 481, 11 N. W. 280. See generally Knox v. S., 164 Ind. 226, 73 N. E. 255, 108 Am. St. 291; S. v. McNaspy, 58 Kan. 691, 50 P. 895, 38 L. R. A. 756; S. v. Dunn, 66 Kan. 483, 71 P. 811; In re Walker, 61 Neb. 803, 86 N. W. 510; Rutledge v. Krauss, 73 N. J. L. 397, 63 A. 988; as to civil cases see Compton v. Wilder, 40 Ohio St. 130.

87. See an excellent article by Judge Lowell, on Winslow's Case, 10 Am. Law Rev. 617.

88. U. S. v. Caldwell, 8 Blatch. 131, 132, 133; U. S. v. Lawrence, 13 Blatch. 295; Reg. v. Phillips, 1 Fost. & F. 105.

89. Adriance v. Lagrave, 59 N. Y. 110, 17 Am. R. 317.

90. U. S. v. Rauscher, 119 U. S. 407, 7 S. Ct. 234; C. v. Hawes, 6 Cent. L. J. 350, 13 Bush. 697, 26 Am. R. 242; U. S. v. Watts, 8 Saw. 370, 14 Fed. 130; In re Baruch, 24 Abb. N. Cas. 109; Ex parte Hibbs, 26 Fed. 421; Ex parte Coy, 32 Fed. 911; S. v. Vanderpool, 39 Ohio St. 273, 48 Am. R. 431; Blandford v. S., 10 Tex. Ap. 627; Cosgrove v. Whitney, 174 U. S. 64, 43 L. Ed. 897, 19 S. Ct. 598; In re Rowe, 23 C. C. A. 103, 77 Fed. 161; Cohn v. Jones, 100 Fed. 639; S. v. Spiegel, 111 Iowa, 701, 83 N. W. 722. By a voluntary return accused waives his right. Ward v. S., 102 Tenn. 724, 52 S. W. 996.

CHAPTER XV.

PRELIMINARY PROCEEDINGS BEFORE A MAGISTRATE.

Compare—with sub-title beginning ante, § 148; and chapters beginning post, §§ 247, 716; also with post, § 285.

§ 224 c. **How Chapter divided.**—We shall consider, I. In General and of the Magistrate; II. Specially of the Proceedings before an Inferior Magistrate.

I. *In General and of the Magistrate.*

§ 225. 1. **Holding for Trial.**—One arrested cannot ordinarily, in justice either to himself or to the public, be put instantly on his trial. Therefore he must be held therefor. This is done by committing him either to an officer who confines him in a prison, or to private persons who as bail are responsible for his appearance, suffering him in the meantime to go at large; the procedure as to which is to be considered in this chapter and the one following the next. Much of it is statutory, but there is some uniformity in the statutes, and mingled with them is a good deal of common law doctrine.

2. **Conservators of the Peace**—have under the common law and the statutes the jurisdiction thus to hold accused persons for trial. We have seen something of the history of these officers, and how in modern times the leading ones are the justices of the peace.[91] Still, the broader doctrine of the books is that the authority to keep the peace, conferred on any officer, renders him a conservator of the peace; who, as such, may by warrant cause persons suspected of any crime to be arrested, and may examine and commit

91. Ante, § 174-176.

them, or hold them by bail for trial before the proper court.[92] Among such conservators *ex officio,* the English books mention the Lord Chancellor, each several justice of the Queen's Bench, every court of record, and every coroner.[93]

§ 226. 1. **Justices of the Peace.**—Practically in our States, this work is ordinarily done by justices of the peace, who derive their authority from the statutes and the common law.[94] Or—

2. **Commissioners, Etc.**—When the offence is against the United States, the committing magistrate is ordinarily "any commissioner of a circuit court to take bail;"[94a] but the statute also gives the power to the Federal Judges,[94b] and to the State justices of the peace and higher judicial officers,[95] the State officers not being compellable, yet permitted, to act.[96] A commissioner of the United States court has authority only over offences created by act of Congress.[97]

92. Ante, § 181 (1); post, § 229; Burn Just. Justices of the Peace, 2 Hawk. P. C. c. 8. Waiver of examination. S. v. Byrd, 41 Mont. 585, 111 P. 407.

93. Burn Just. ut sup.; Chit. Crim. Law, 34-36. Another proposition, narrower than that in the text, is that "where a statute gives a justice [or, plainly, any judicial officer] jurisdiction over an offense, it impliedly gives him power to apprehend any person charged with such offense." 1 Chit. Crim. Law, 35.

94. Ante, § 176; P. v. Mellor, 2 Colo. 705; C. v. McNeill, 19 Pick. 127; State Treasurer v. Rice, 11 Vt. 339; S. v. Pigg, 80 Kan. 481, 103 P. 121; Ormond v. Ball, 120 Ga. 916, 48 S. E. 383; Pierson v. S., 129 Ala. 120, 29 So. 843; P. v. Crespi, 115 Cal. 50, 46 P. 863; P. v. Sehorn, 116 Cal. 503, 48 P. 495; Dodghill v. Com., 11 Ky. L. 368. The same magistrate need not necessarily conduct the entire proceedings. Ex parte Bollman, 4 Cranch, 75, 129. Though generally one magistrate suffices, a particular statute may require two. Franklyn's Case, 1 Mod. 68; Murphy v. C., 11 Bush. 217.

94a. In re Wahll, 42 Fed. 822.

94b. Who has only the powers of a commissioner while acting. U. S. v. Hughes, 70 Fed. 972.

95. R. S. of U. S. § 1014; Ex parte Gist, 26 Ala. 156.

96. Ante, § 221 (2).

97. U. S. v. Hand, 6 McLean, 274. And see, as to commissioners, U. S. v. Rundlett, 2 Curt. C. C. 41; U. S. v. Case, 8 Blatch. 250; U. S. v. Horton's Sureties, 2 Dil. 94; Vanderpool v. S., 34 Ark. 174; U. S. v. Harden, 4 Hughes, 455; U. S. v. Smith, 17 Fed. 510; and cases stated, 1 Brightly Fed. Dig. 129.

§ 227. 1. **The Warrant**—of the inferior magistrate may perhaps differ in some respects, not greatly, from that of the superior. Thus,—

2. **Seal.**—Opinions are divided as to whether the warrant of a justice of the peace must be under seal, where the statute is silent on the question.[98] Chitty[99] deems that though a seal is commonly looked upon as necessary,[99a] still in the absence of a statutory requirement, the warrant seems to suffice if in writing and signed by the magistrate.[1] It has been adjudged valid without seal in South Carolina,[2] New Hampshire,[3] and New York;[4] but in some of the other States the seal is held to be essential.[5] A wafer, if adopted

98. Ante, § 187 (1).

99. 1 Chit. Crim. Law, 38.

99a. 1 Hale P. C. 577; 2 Ib. 111; Com. Dig. Imprisonment, H. 7; 2 Hawk. P. C. c. 13, § 21; 4 Bl. Com. 290; Windsor v. Gover, 2 Saund. (Wms. Ed.) 302, 305a, note 13.

1. Padfield v. Cabell (Willes), 411; Bull. N. P. 83; Burn Just. Warrant, IV; S. v. McNally, 34 Me. 210, 56 Am. Dec. 650; Dick Just. Warrant, III; Toone, 450. See Starr v. U. S., 153 U. S. 614, 14 S. Ct. 914 where a warrant was without a seal statute not requiring it.

2. S. v. Vaughn, Harper, 313.

3. Thompson v. Fellows, 1 Fost. N. H. 425; Davis v. Clements, 2 N. H. 390.

4. Gano v. Hall, 42 N. Y. 67; Millett v. Baker, 42 Barb. 215.

5. Welch v. Scott, 5 Ire. 72, 75; S. v. Caswell, T. U. P. Charl. 280; Somerville v. Hunt, 3 Har. & McH. 113; Tackett v. S., 3 Yerg. 392, 24 Am. D. 582; Lough v. Millard, 2 R. I. 436; S. v. Goyette, 11 R. I. 592; S. v. Drake, 36 Me. 366, 368, 58 Am. D. 757; S. v. Weed, 21 N. H. 262, 53 Am. Dec. 188; P. v. Holcomb, 3 Park. Cr. 656; in Welch v. Scott, Ruffin, C. J., said: "So many of the older and most respectable authorities lay it down positively that a seal is necessary to a warrant for a criminal charge, that we are obliged to consider it established law." In S. v. Drake, Shepley, C. J., observed that the cases holding the seal to be unnecesssary "do not appear to have been those authorizing an arrest or imprisonment of a person;" adding,—"If a warrant issued without a seal in a criminal prosecution, by a magistrate, may be valid, it would seem that one might be when so issued by any court of justice; and yet all such precepts, issuing from a court having a seal, must be issued under the sanction of that seal. This appears to have been admitted by the Lord Chief-Justice in his opinion in the case of Padfield v. Cabell, Willes, 411, when the precept issued from any court of record. Whenever it has been held that a warrant issued in a criminal prosecution might be valid without a seal, it is apparent that there has been a straining of the law to support the proceedings." P., 369. I

by the magistrate as his seal, is adequate.[6] The court, not the jury, determines whether or not a warrant is under seal.[7]

§ 228. 1. **Jurisdictional Matter in Warrant.**—The familiar doctrine that the record of a court of limited jurisdiction must affirmatively show authority over the particular case,[8] does not in reason, or apparently in practice, apply to the warrant.[9] For a justice of the peace may issue his warrant of arrest for an offence over which he has no jurisdiction;[10] in respect whereto, his powers are not ordinarily inferior to those of the highest judge, though commonly extending simply over a narrower locality. But by whatever officer issued,—

2. **The Warrant of Arrest[11] or Mittimus[12]**—must state the offence[13] and the offending person.[14] Precisely how minute it must be is a question partly of local usage, on which the

cannot but think that justices of the peace and courts of record are properly distinguishable as to the warrant; and that on this mere technical question, where nothing of legal principle is involved, it accords well with our modern ideas to hold the simpler form sufficient.

6. S. v. McNally, 34 Me. 210, 56 Am. Dec. 650. See Bishop Con., § 111.

7. S. v. Worley, 11 Ire. 242. Where the seal was not in line with the magistrate's name, still the court on inspection of the whole writing held it to be under seal. S. v. Coyle, 33 Me. 427.

8. Post, §§ 236, 664.

9. Rex v. Goodall, 1 Keny. 122.

10. 1 Chit. Crim. Law, 35.

11. In re Booth, 3 Wis. 1; Caudle v. Seymour, 1 Q. B. 889; 1 Gale & D. 454; S. v. Rowe, 8 Rich. 17; S. v. Everett, Dudley S. C. 295; Floyd v. S., 7 Eng. 43, 54 Am. D. 250.

12. Rex v. Judd, 2 T. R. 255, 1 Leach, 484, 2 East P. C. 1018; S. v. Bandy, 2 Ga. Decis. 40; Ex parte Rohe, 5 Pike, 104; Ricker, petitioner, 32 Me. 37; Rex v. Kendal, 1 Ld. Raym. 65, 1 Salk. 347; s. c. nom. Rex v. Kendall, Skin. 596, 599; Rex v. Wyndham, 1 Stra. 2; Rex v. Marks, 3 East, 157; Day v. Day, 4 Md. 262; Bennac v. P., 4 Barb. 31; C. v. Ward, 4 Mass. 497; Young v. C., 1 Rob. Va. 744; Ex parte Walpole, 85 Cal. 362, 24 P. 657; P. v. Thompson, 84 Cal. 598, 24 P. 384; P. v. Sacramento, etc. Ass'n, 12 Cal. Ap. 411, 107 P. 712.

13. Ante, § 187 (1). Floyd v. S., 12 Ark. 43, 44 Am. Dec. 250; P v. Harris, 103 Mich. 473, 61 N. W. 871; P. v. Kenyon, 93 Mich. 19, 52 N. W. 1033; S. v. Sherman, 16 R. I. 631, 18 A. 1040.

14. Harwood v. Siphers, 70 Me. 464; Graham v. S., 29 Tex. Ap. 31, 13 S. W. 1013.

authorities are not quite harmonious; as the reader will see on consulting the cases cited to this[15] and a preceding section.[16] The other requirements of the warrant and the *mittimus* appear in other connections.

§ 229. 1. **The Judges of the Courts**—we have seen to be among the conservators of the peace.[17] By the English doctrine, they may commit persons before them when the occasion for it judicially appears.[18] If they order an original arrest, which may be followed by a preliminary examination and holding for trial, the practice—not obligatory, but permissible—is to make the warrant returnable before a justice of the peace, who will conduct the remainder of the proceedings.[19] We have seen[20] what powers in United States cases an act of Congress has given to our American judges. And the doctrine with us appears to be that without the aid of a statute our judges have the same authority over this matter as the English. Of course, in a particular State, legislation may have modified the doctrine. The court as such may exercise the power, or the judge may, in his capacity of magistrate.[21] Some particulars are—

15. A warrant stating that a murder was committed "somewhere between this place and the State of Texas," was adjudged void for uncertainty. Price v. Graham, 3 Jones (N. C.) 545. See also Doyle v. Falconer, Law Rep. 1 P. C. 328; Rex v. Kendal, Holt, 144; Ex parte Burford, 3 Chanch, 448; Bradstreet v. Furgeson, 17 Wend. 181, 23 Wend. 638; Boyd v. S., 17 Ga. 194; Pratt v. Bogardus, 49 Barb. 89; Boyd v. C., 1 Rob. Va. 691; Ex parte Cross, 1 C. B. n. s. 573; Lismore v. S., 94 Ark. 207, 126 S. W. 853; S. v. Baker, 57 Kan. 541, 46 P. 947; S. v. Smith, 57 Kan. 673, 47 P. 541; Haskins v. Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. 376; McGee v. S., 115 Ala. 155, 22 So. 113; Spear v. S., 120 Ala. 351, 25 So. 46; Krauskopf v. Tallman, 170 N. Y. 561, 62 N. E. 1096. A Massachusetts statute requires the warrant to recite the substance of the accusation; and this is held to be complied with by making it on the same paper with the complaint, and referring to it. C. v. Dean, 9 Gray, 288. And see post, § 242.

16. Ante, § 187 (1).

17. Ante, §§ 225 (2), 226; 1 Hale P. C. 578.

18. Authorities cited ante, § 225 (2); 1 Chit. Crim. Law, 34.

19. 1 Hale P. C. 578; 1 Chit. Crim. Law, 36. See Ex parte Eagan, 18 Fla. 194.

20. Ante, § 226 (2).

21. Consult Faust v. S., 45 Wis. 273; Berry v. S., Dudley S. C. 215; C. v. The Jailer, 1 Grant (Pa.), 218; S. v. Thornton, 13 Ire. 256; P. v. Smith, 1 Cal. 9; Cameron v. S., 13

2. **Defective Proceedings quashed.**—If a plea in abatement is sustained[22] or otherwise an ill indictment is quashed, the defendant is not necessarily to go free; but the court may commit or hold him to bail, to answer to a fresh indictment;[23] or, the grand jury being in session, require him to remain in court while they examine his case and bring in a new indictment;[24] or direct the officer to take him before a justice of the peace to answer to a fresh complaint.[25] But if the statute of limitations has fully run, barring the new proceedings,[26] or if for any cause they cannot be constitutionally had,[27] the defendant will be discharged.[28] Again,—

3. **Sureties of Peace.**—Should the evidence on the trial not sustain the indictment, yet show what will justify the court in putting the defendant under bonds to keep the

Ark. 712; C. v. Cummins, 18 B. Monr. 26; Ex parte Eagan, 18 Fla. 194; Taintor v. Taylor, 36 Conn. 242, 251, 4 Am. R. 58; Lindsay v. P., 67 Barb. 548; In re Smith, 4 Colo. 532; S. v. Wofford, 10 Sm. & M. 626. It was held in a United States circuit court, by Marshall, C. J., that the court, as such, has authority to commit a person charged with an offense, although the grand jury before whom a bill may be presented, is in session. He said "It is believed to be a correct position that the power to commit for offenses of which it has cognizance is exercised by every court of criminal jurisdiction, and that courts as well as individual magistrates are conservators of the peace. Were it otherwise, the consequence would only be that it would become the duty of the judge to descend from the bench, and, in his character as an individual magistrate, to do that which the court is asked to do." U. S. v. Burr, 1 Burr's Trial (Phila. Ed.), 79, 80.

22. Rowland v. S., 126 Ind. 517, 26 N. E. 485; S. v. Robinson, 2 Lea, 114.

23. U. S. v. Townmaker, Hemp. 299; S. v. Hasledahl, 3 N. D. 36, 53 N. W. 430; Nicholls v. S., 2 Southard, 539; Peter v. S., 3 How. (Miss.), 433; U. S. v. Dustin, 2 Bond, 332; Jones v. S., 11 Sm. & M. 315; Ex parte Graves, 61 Ala. 381; P. v. Sexton, 132 Cal. 37, 64 P. 104; Ex parte Nicholas, 91 Cal. 640, 28 P. 47. See P. v. Blakeley, 4 Par. Cr. 176.

24. Crumpton v. S., 43 Ala. 31. And see Reg. v. Rudick, 8 Car. & P. 237.

25. Young v. C., 1 Rob. (Va.), 744.

26. Redfield v. S., 24 Tex. 133.

27. S. v. Jones, 6 Halst. 289.

28. And see Ex parte Bull, 42 Cal. 196; Gooden v. S., 35 Ala. 430; Fitch v. S., 2 Nott & McC. 558.

peace,[29] the practice, at least in some localities, is, on the coming in of the verdict of not guilty, to require such bonds instead of discharging him.[30] Doubtless there are States in which this could not be done.

§ 229 a. **Mayor.**—In a part of our States, the mayor of a city has the jurisdiction of a justice of the peace.[31]

§ 229 b. **Coroner.**—The inquest of a coroner is in its nature a preliminary inquiry, so he may commit or bind over suspected persons and witnesses.[32] Beyond which, we have seen that at common law he is a conservator of the peace,[33] though perhaps he is not such under the statutes of all our States.

29. New Crim. Law, I, § 945; post, § 264n.; Burn Just. Sureties of the Peace; Prickett v. Gratrex, 8 Q. B. 1020; Ritchey v. Davis, 11 Iowa, 124; Steele v. S., 4 Ind. 561; C. v. Ward, 4 Mass. 497; C. v. Morey, 8 Mass. 78; Conklin v. S., 8 Ind. 458; Long v. S., 10 Ind. 353; Collins v. S., 11 Ind. 312; S. v. Maners, 16 Ind. 175; Beckwith v. S., 21 Ind. 225; S. v. Tooley, 1 Head, 9; C. v. Oldham, 1 Dana, 466; Doyle's Case, 19 Abb. Pr. 269; Tomlin v. S., 19 Ala. 9.

30. Bamber v. C., 10 Pa. 339; Respublica v. Donagan, 2 Yeates, 437; P. v. Berner, 13 Johns. 383. See Reg. v. Rogers, 7 Mod. 28; by statute S. v. Miller, 60 Kan. 857, 56 P. 1132, affirming S. v. Woodward, 7 Kan. Ap. 421, 53 P. 278, which is constitutional. The power must be carefully exercised. A single offense, not infamous, unless aggravated does not authorize court to require sureties. S. v. Gillilan, 38 S. E. 516, affirmed 51 W. Va. 278, 41 S. E. 131, 57 L. R. A. 426, 90 Am. St. 793.

31. Santo v. S., 2 Iowa, 165, 63 Am. D. 487; Cluggish v. Rogers, 13 Ind. 538; Gulick v. New, 14 Ind. 93, 77 Am. D. 49; C. v. Leight, 1 B. Monr. 107; Shafer v. Mumma, 17 Md. 331, 79 Am. D. 656. See Holmes v. S., 44 Tex. 631.

32. Post, §§ 1198, 1199; Burn Just. Coroner; 1 Chit. Crim. Law, 164; Reg. v. Taylor, 9 Car. & P. 672; Bass v. S., 29 Ark. 142; Wormley v. C., 10 Grat. 658; P. v. Budge, 4 Par. Cr. 519; Ex parte Anderson, 55 Ark. 527, 18 S. W. 526.

33. Ante, § 225 (2); 2 Hale P. C. 88; 1 Chit. Crim. Law, 26. And see Giles v. Brown, 1 Mill. 230; Ex parte Anderson, 55 Ark. 527, 18 S. W. 856; Brown v. S., 71 Ind. 470. The purpose of a preliminary examination is (1) to inquire concerning the commission of crime and the connection of accused therewith, (2) to perpetuate testimony, and (3) to determine the amount of bail which will probably secure the attendance of accused to answer the charge. S. v. Pigg, 80 Kan. 481, 103 Pac. 121.

II. *Specially of the Proceedings before an Inferior Magistrate.*

§ 230. 1. **Statutes,**—more or less differing in our States, are largely the foundation of these proceedings, though combining with them are principles of the common law. Enacted primarily as guides to the justices of the peace, questions not yet solved by decisions may arise as to how far they control the superior judges when acting in the like capacity. In reason, they should be held applicable except where their terms exclude this interpretation.

2. **Whether Complaint.**—Passing by commitments by the magistrate for criminal acts in his presence,[34] he cannot in the ordinary case proceed against one without an accusation from a third person.[35] And he should consider the nature of the accusation, and the evidence to it, before issuing his warrant of arrest.[36]

3. **Under Oath.**—In the absence of any command from the written law, "a justice of the peace," said Lord Holt, "may commit without oath,[37] but he is not wise if he doth so, for then he must make out the cause of commitment at his peril, but if oath be made he is safe."[38] Most of our statutes require the verification by oath;[39] and some of our State constitutions forbid warrants of arrest except on "probable cause, supported by oath."[40]

34. Ante, §§ 177-179.

35. Windham v. Clere, Cro. Eliz. 130; P. v. McLean, 68 Mich. 480, 36 N. W. 231; Rafferty v. P., 69 Ill. 111, 18 Am. R. 601; Robinson v. S. (Tex. Cr. Ap. 1898), 44 S. W. 845; Mendoz v. S., 56 Tex. Cr. Ap. 65, 118 S. W. 1031; Diltz v. S., 56 Tex. Cr. Ap. 127, 119 S. W. 92; S. v. Hoben (Utah 1909), 102 P. 1000; S. v. Wakefield, 60 Vt. 618, 15 A. 181; P. v. Lalique, 10 Cal. Ap. 669, 103 Pac. 164; Smith v. Clausmeier, 136 Ind. 105, 43 Am. St. 111. Even if the accused voluntarily appears. S. v. Goetz, 65 Kan. 125, 69 P. 187.

36. P. v. Lynch, 29 Mich. 274; Rex v. Simons, 6 Car. & P. 540; Bradstreet v. Furgeson, 17 Wend. 181; Redmond v. S., 12 Kan. 172; Bellinger v. P., 8 Wend. 595.

37. Post, §§ 232, 718.

38. Rex v. Pain, Holt, 294, 295. See Elsee v. Smith, 1 D. & R. 97, 2 Chit. 304; S. v. Lamos, 26 Me. 258.

39. Allen v. Staples, 6 Gray, 491; White v. S., 28 Neb. 341. See Hathcock v. S., 88 Ga. 91, 13 S. E. 959. Unless filed by public official, S. v. Maupin, 71 Mo. App. 54; S. v. Comstock, 27 Vt. 553.

40. Walker v. Cruikshank, 2 Hill (N. W.), 296; Conner v. C., 3

4. **Practice as to Oath.**—The proper evidence of the oath is the magistrate's certificate.[41] The particular sworn testimony need not be set out, unless the statute so requires.[42] It suffices that the complaint is in due form, under oath, and duly certified by the magistrate. It cannot be invalidated by a showing that there was no further examination of the complainant.[43]

5. **The Complaint**—should be in writing.[44] It must adequately charge an offence;[45] but not necessarily, it seems, in the full, technical form employed in an indictment.[46] It is sufficient if on the complainant's knowledge and belief,[47] yet not if on his information and belief.[48] Still,

Binn. 38; S. v. Gleason, 32 Kan. 245, 4 P. 363.

41. S. v. J. H., 1 Tyler, 444. As to signature and certificate of Justice to jurat. Jennings v. S., 30 Tex. Ap. 428, 18 S. W. 90; Neimann v. S., 29 Tex. Ap. 360, 16 S. W. 253; no certificate necessary. P. v. Lane, 127 Mich. 271, 82 N. W. 896; S. v. Freeman, 59 Vt. 661, 10 A. 752.

42. S. v. Hobbs, 39 Me. 212; Com. v. Bradley, 132 Ky. 512, 116 S. W. 761.

43. C. v. Farrell, 8 Gray, 463; P. v. O'Brien, 18 Cal. Ap. 641, 97 P. 679.

44. Missouri City v. Hutchinson, 71 Mo. 46.

45. Housh v. P., 75 Ill. 487; Taylor v. S., 32 Ind. 153; Moore v. Watts, Breese, 18; In re Way, 41 Mich. 299, 1 N. W. 1021; P. v. Davis, 122 N. Y. S. 788. On suspicion of having committed larceny insufficient, P. v. Flynn, 118 N. Y. S. 532.

46. Ewing v. Sanford, 19 Ala. 605; Field v. Ireland, 21 Ala. 240; P. v. Hicks, 15 Barb. 153; Payne v. Barnes, 5 Barb. 465; Parker v. S., 4 Ohio St. 563; S. v. Corson, 1 Fairf. 473; S. v. Moon, 76 Kan. 349, 80 P. 597; Ex parte Flowers, 2 Okla. Cr. Ap. 430, 101 P. 860; S. v. Anderson, 35 Utah 496, 101 P. 385; Hampton v. S., 132 Ala. 180, 32 So. 230.

47. S. v. Hobbs, 39 Me. 212.

48. S. v. Gleason, 32 Kan. 245, 4 P. 363; S. v. Good, 9 Lea, 240; Blodgett v. Race, 18 Hun, 132; In re Rule of Court, 3 Woods, 502; S. v. Graffmuller, 26 Minn. 6; S. v. Simpson, 136 Mo. Ap. 664, 118 S. W. 1187; P. v. Preston, 89 N. Y. S. 889, 44 Miss. 67, 18 N. Y. Cr. 265; De Graff v. S., 2 Okla. Cr. Ap. 519, 103 P. 538; S. v. McLain, 13 N. D. 368, 102 N. W. 407; U. S. v. Sapinkow, 90 Fed. 654; Monroe v. S., 137 Ala. 88, 34 So. 382; Holton v. Bimrod, 61 Kan. 13, 58 P. 558; In re Blum, 9 Misc. 571, 30 N. Y. S. 396; U. S. v. Sapinkow, 90 Fed. 654. Complaint must follow language of statute. City of Bessemer v. Eidge, 162 Ala. 201, 50 So. 270. See S. v. Dale, 3 Wis. 795; P. v. Becker, 20 N. Y. 354; S. v. Babbitt, 32 Kan. 253, 4 P. 367; Village of Sparta v. Boorom, 129 Mich 555, 558, 90 N. W. 681.

if the evidence at the hearing discloses an offence not charged, or not adequately so, the defendant is not to be set at liberty, but either with or without an amendment of the complaint[49] he is to be bound over or committed for his real offence.[50]

§ 231. 1. **For Jurat,**—the magistrate's simple certificate to the complaint, as "Taken and sworn before me," suffices.[51] So does any other like form from which the idea can be collected.[52]

2. **Amended**—may be a jurat formally inadequate, if the facts permit.[53]

§ 232. 1. **Competency of Complainant.**—It is believed that generally, in England[54] and this country,[55] a person who from infamy or other cause is disqualified to be a witness at a trial cannot make a valid complaint. But this may not be universally so; and where a written complaint

49. Post, § 234.

50. P. v. Wheeler, 73 Cal. 252, 14 P. 796; Ex parte Burke, 58 Miss. 50; Ex parte Claunch, 71 Mo. 233. And see further, on this and some related questions, Monroe v. Lawrence, 44 Kan. 607, 24 P. 1113, 10 L. R. A. 520; Lewis v. S., 15 Neb. 89, 17 N. W. 366; S. v. Perkins, 63 N. H. 89; S. v. Bryson, 84 N. C. 780; P. v. Dowd, 44 Mich. 488, 7 N. W. 71; S. v. Sykes, 104 N. C. 700, 10 N. E. 158; White v. S., 28 Neb. 341, 44 N. W. 443; P. v. Hare, 57 Mich. 505, 24 N. W. 843.

51. C. v. Bennett, 7 Allen, 533. See Smart v. Howe, 3 Mich. 590; In re Teachout, 15 Mich. 346; Jennings v. S., 30 Tex. Ap. 428, 18 S. W. 90.

52. C. v. Wallace, 14 Gray, 382; C. v. Sullivan, 14 Gray, 97; C. v. Keefe, 7 Gray, 332; C. v. Quin, 5 Gray, 478; Webb v. S., 21 Ind. 236. **Further as to Form of Affidavit.** The signature of the affiant to an affidavit, though proper and usual, is not necessary. Watts v. Womack, 44 Ala. 605; Hitsman v. Garrard, 1 Harrison, 124; Shelton v. Berry, 19 Tex. 154, 70 Am. D. 326; Millius v. Shafer, 3 Denio, 60. But see Hathaway v. Scott, 11 Paige, 173. It must be so distinct, positive, and formal that perjury can be assigned upon it, or it will be void. Watson v. Walker, 1 Moore & S. 437; Peers v. Carter, 4 Litt. 269; Gaddis v. Durashy, 1 Green (N. J.), 324. The judge should sign jurat. Jennings v. S., 30 Tex. Ap. 428, 18 S. W. 90, contra. P. v. Lane, 124 Mich. 271, 82 N. W. 896; S. v. Freeman, 59 Vt. 661, 10 A. 752. Jurat must show official capacity of the judge. Mican v. S. (Tex. Ap. 1892), 19 S. W. 762.

53. S. v. Smith, 54 Me. 33.

54. Rex v. Moore, Cas. temp. Hardw. 176; Walker v. Kearney, 2 Stra. 1148; 1 Greenl. Ev., § 374.

55. Taulman v. S., 37 Ind. 353; S. v. Downing, 22 Mo. Ap. 504.

and an oath were deemed not indispensable, a complaint by such incompetent person was held to suffice.[56] Again, a statute provided that "no negro or mulatto shall be a *witness,*" etc., yet such person was adjudged competent, by his own oath, to require a white man to give security to keep the peace.[57] If, in the particular case, the rejecting of an infamous man as complainant would deprive him of a legal right, the court, in reason, could not do otherwise than accept him.

2. **Statutory Complainant refusing.**—A statute forbade prosecutions for adultery except "on the complaint of the husband or wife." And it was held that a husband whose wife refused, could not be proceeded against, though she had complained against the other guilty party.[58]

§ 233. 1. **On Probable Cause.**—The issue before the magistrate is not whether in fact the defendant is guilty, but whether there is probable cause to believe him guilty, so as to require an investigation by a jury.[59] Thus, contrary to the rule at the final trial,[60] the magistrate may

56. S. v. Killet, 2 Bailey, 289, 290. And see U. S. v. Burr, Burr's Trial (Philad. Ed.), 11, 15; Steinke v. S. (Tex. Cr. Ap. 1905), 86 S. W. 753. If a convict is a competent witness his complaint confers jurisdiction. P. v. Stokes, 24 N. Y. S. 727, 728, 30 Abb. (N. C.) 200; Perez v. S., 10 Tex. Ap. 327; Rivers v. S., 10 Tex. Ap. 177. Any one competent to take oath may make a complaint. Com. v. Tobia, 141 Mass. 129, 6 N. E. 217; Com. v. Alden, 143 Mass. 113, 9 N. E. 15; as a wife against her husband for an assault on her. P. v. Sebring, 66 Mich. 705, 33 N. W. 808; Goodwin v. S., 114 Wis. 318, 90 N. W. 170, but not for an assault on another. P. v. Westbrook, 94 Mich. 629, 54 N. W. 486. By county attorney. S. v. Clancy, 20 Mont. 498, 52 P. 267.

57. C. v. Oldham, 1 Dana, 466.

58. S. v. Roth, 17 Iowa, 336, Wright, C. J., dissenting. **Other Informalities in Complaint.** S. v. Soragan, 40 Vt. 450; C. v. Barhight, 9 Gray, 113.

59. Post, §§ 866, 867; S. v. Hartwell, 35 Me. 129; U. S. v. Burr, Burr's Trial (Philad. Ed.), 11, 15; Cox v. Coleridge, 1 B. & C. 37, 2 D. & R. 86; Secor v. Babcock, 2 Johns. 203; In re Van Campen, 2 Ben. 419; Yaner v. P., 34 Mich. 286; S. v. Corson, 1 Fairf. 473; Cargen v. P., 39 Mich. 549; Streater v. S., 137 Ala. 93, 34 So. 395; Sims v. S., 137 Ala. 79, 34 So. 400; Ex parte Heacock, 8 Cal. Ap. 420, 97 P. 77; Haskins v. Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. 376.

60. Post, § 1058.

accepted the prisoner's confessions as alone adequate proof of the *corpus delicti*[61] while still he will discharge him if satisfied that no crime has been committed.[62] It has sometimes been supposed, and even held, that only the witnesses for the complainant, not also the defendant's, should be examined;[63] but this hard doctrine is not the better one, even in authority.[64] Lord Denman, in accord with what has become the common practice, deemed that "the magistrate should hear the evidence of such witnesses as the prisoner, on being asked, wishes to be examined in his defence." If they are believed, and, not contradicting the testimony on the other side, harmonize all with innocence, there is "no necessity for any further proceedings; but if the witnesses so called contradict those of the prosecution in material points, then the case would be properly sent to a jury to ascertain the truth of the statements of each party. And the depositions of the prisoner's witnesses, being taken and signed by them, should be transmitted to the judge, together with the depositions in support of the charge."[65]

2. **Name of Informant.**—An arresting officer, who has examined as a witness, was not compelled to disclose from whom he received a confidential communication which led to the detection.[66]

§ 234. 1. **Amending or substituting Complaint.**—An insufficient complaint[67] may be amended by leave of the magistrate, the complainant being present consenting;[68] or,

61. P. v. Cokahonour, 120 Cal. 253, 52 P. 505; U. S. v. Bloomgart, 24 Fed. Cases No. 14, 612, 2 Ben. 356.

62. U. S. v. Lumsden, 1 Bond, 5; Yaner v. P., supra. See post, § 866; Ganea v. Southern Pacific Rld., 51 Cal. 140.

63. U. S. v. White, 2 Wash. C. C. 29. And see Rex v. Neal, Cas. temp. Hardw. 112.

64. Post, § 867; Ex parte Mahone, 30 Ala. 49, 68 Am. D. 111; Templeton v. P., 27 Mich. 501; U. S. v. White, 28 Fed. Cases No. 16685, 2 Wash. 29.

65. Anonymous, 2 Car. & K. 845.

66. U. S. v. White, 2 Wash. C. C. 29.

67. For some particulars, see ante, § 230 (5).

68. Linhart v. Buiff, 11 Cal. 280. Material amendments not allowed, Moore v. S., 165 Ala. 107, 51 So. 357; P. v. Mellor, 153 Ind. 436, 55 N. E. 226; Ross v. S., 9 Ind. Ap. 35, 36 N. E. 167. See, also, Wright v. S., 136 Ala. 139, 34 So. 233;

if an offence different from that charged appears, the prisoner may still be held until a fresh complaint is drawn, covering the crime as proved.[69] Not conflicting herewith Lord Tenterden ruled that,—

2. **Detaining Known Person.**—If in the magistrates' court one is present against whom they suspect an absent person wishes to make a complaint for a misdemeanor, they cannot detain him to send for such person. "The magistrate," it was said, "should have the charge actually made before he detains the party." [70]

§ 234a. **Continuing, Bailing.**—The magistrate may make reasonable continuances of the hearing, and in the intervals bail [70a] or commit the prisoner.[71]

§ 234 b. 1. **The Procedure before the Magistrate**—differs in many respects in our States, owing to divergences in the statutes; leaving various questions not best to be entered into here.[72]

2. **Testimony and Statement.**—In England and some of our States, not all,[73] the magistrate takes, in writing,[73a] the

amending on demurrer, Jones v. S., 147 Ala. 701, 41 So. 299. Changing charge, Com. v. Jones, 118 Ky. 889, 26 Ky. L. 867, 82 S. W. 643. Slight amendments, Oats v. S., 153 Ind. 436, 55 N. E. 226; Chapman v. Lee Mercantile Co., 7 Kan. Ap. 254, 53 P. 778.

69. S. v. Shaw, 4 Ind. 428; Redmond v. S., 12 Kan. 172; P. v. Smith, 1 Cal. 9; Yaner v. P., 34 Mich. 286.

70. Rex v. Birnie, 5 Car. & P. 206, 1 Moody & R. 160.

70a. Not in absence of statute, S. v. Kruise, 32 N. J. L. 313; S. v. Jones, 100 N. C. 438, 6 S. E. 655; S. v. Bartlett, 70 Minn. 199, 72 N. W. 1067.

71. Scavage v. Tateham, Cro. Eliz. 829; Reg. v. London, 1 Dav. & M. 486, 5 Q. B. 555; S. v. Gachenheimer, 30 Ind. 63; P. v. Freeman, 20 Mich. 413; S. v. Allen, 33 Ala. 422; Potter v. Kingsbury, 4 Day, 98; Hamilton v. P., 29 Mich. 173; Ogden v. P., 62 Ill. 63; Davis v. Capper, 10 B. & C. 28, 5 Man. & R. 53, 4 Car. & P. 134; Stimpson v. Rogers, 4 Blatch. 333; In re Ludwig, 32 Fed. 774. See C. v. Salyer, 8 Bush, 461; Com. v. Maloney, 145 Mass. 205, 13 N. E. 482; S. v. Aucoin, 47 La. Ann. 1677; In re Blair, 32 Misc. 175, 65 N. Y. S. 640, 8 N. Y. Ann. 54.

72. P. v. Gibbons, 43 Cal. 557; S. v. Vandergraff, 23 La. Ann. 96; Kendle v. Tarbell, 24 Ohio St. 196; Scovern v. S., 6 Ohio St. 288.

73. P. v. Hare, 57 Mich. 505, 24 N. W. 843.

73a. S. v. Braithwayte, 3 Ida. 119, 27 P. 731; S. v. Flowers, 58 Kan. 702, 50 P. 938.

testimony of the witnesses and the prisoner's statement.[74] The orderly course, the prisoner being present,[75] is to receive first the evidence against him, then call upon him for whatever he has to say.[76]

3. **Waiving Examination.**—He may, at least in some of our States, and with the consent of the magistrate, waive the examination; and then no testimony need be taken against him.[77]

4. **Holding Party—Witnesses.**—The magistrate, on determining to send the prisoner to the higher court, commits him and the witnesses, or takes their several recognizances, as the case may require.[78] Then, and in the absence of any special statute, his functions in the case cease.[79]

74. Post, § 1198 et seq.; Rex v. Coveney, 7 Car. & P. 667; Rex v. Thomas, 7 Car. & P. 817; Reg. v. Painter, 2 Car. & K. 319, 2 Cox C. C. 244; Rex v. Grady, 7 Car. & P. 650; Rex v. Fuller, 7 Car. & P. 269; Nelson v. S., 2 Swan (Tenn.), 237; S. v. Parish, Busbee, 239; S. v. McLeod, 1 Hawks, 344; Wright v. S., 50 Miss. 332; Bellinger v. P., 8 Wend. 595; Evans v. S., 13 Tex. Ap. 225; Winn v. Peckham, 42 Wis. 493. Failure to have witnesses sign their testimony if it is required by a statute avoids the proceedings. P. v. Dowdigan, 67 Mich. 95, 38 N. W. 920; P. v. Brocks, 64 Mich. 691, 31 N. W. 585; P. v. Chapman, 62 Mich. 280, 28 N. W. 896.

75. Reg. v. Johnson, 2 Car. & K. 394.

76. Rex v. Fagg, 4 Car. & P. 566. See Rex v. Jones, Car. Crim. Law (3d Ed.) 13; Rex v. Green, 5 Car. & P. 312.

77. S. v. Ritty, 23 Ohio St. 562; In re Malison, 36 Kan. 725, 14 P. 144; Cowell v. Patterson, 49 Iowa, 514; Stuart v. P., 42 Mich. 255, 3 N. W. 863; S. v. Larkins, 5 Idaho, 200, 47 P. 945; Reinoehl v. S., 62 Neb. 619, 87 N. W. 355; S. v. Wright, 15 S. D. 628, 91 N. W. 311. Contra, S. v. Pigg, 80 Kan. 481, 103 P. 121.

78. C. v. Ward, 4 Mass. 497; S. v. Heathman, Wright (Ohio), 690; Simpson v. Robert, 35 Ga. 180; Redmond v. S., 12 Kan. 172; Arnold v. S., 25 Ala. 69; Reg. v. Smith, 2 Car. & K. 207; U. S. v. Lloyd, 4 Blatch. 427; S. v. Thompson, 20 N. H. 250; S. v. Sargent (Minn. 1898), 73 N. W. 626.

79. S. v. Russell, 24 Tex. 505; Steel v. Williams, 13 Ind. 73; S. v. Young, 56 Me. 219; S. v. Randolph, 26 Mo. 213. See S. v. Mousely, 4 Harring. (Del.) 553. Warrant should describe offense plainly with time and place of its commission and describe accused by name. Collins v. Brackett, 34 Minn. 399, 25 N. W. 708; P. v. Johnson, 116 N. Y. 134, 17 N. E. 684; see also, Ex parte Walpole, 85 Cal. 362, 24 P. 657; S. v. Huegin, 110 Wis.

§ 235. 1. **Warrant of Commitment—(Warrant of Arrest).**—We have seen something of the form of the warrant of commitment.[80] In the note, are further cases on it and the warrant for arrest.[81] It may be addressed to any officer in legal charge of the prison; as, sheriff or jailer.[82] From principles already stated,[83] it seems that if a warrant of arrest is insufficient or void, yet if the accused person has been brought before the magistrate under it, he is not therefore to be set at liberty, whatever may be his rights as against the officer and other persons connected with the proceeding.[84]

2. **Supersedeas.**—A South Carolina case holds that one justice of the peace cannot supersede another's warrant for a crime.[85]

189, 85 N. W. 1146, 62 L. R. A. 700; Butler v. S. (Tex. Cr. 1896), 38 S. W. 46.

80. Ante, §§ 227, 228.

81. Rex. v. Goodall, 1 Keny. 122; S. v. Hawes, 65 N. C. 301; Rafferty v. P., 69 Ill. 111, 18 Am. R. 601; C. v. McCaul, 1 Va. Cas. 271, 300; C. v. Murray, 2 Va. Cas. 504; Bradstreet v. Furgeson, 17 Wend. 181, 23 Wend. 638; Rex v. Hood, 1 Moody, 281; Reg. v. Downey, 7 Q. B. 281; Prell v. McDonald, 7 Kan. 426, 12 Am. R. 423; Mayhew v. Parker, 8 T. R. 110; Mayhew v. Hill, 2 Esp. 683; McEwin v. S., 3 Sm. & M. 120; P. v. Rhoner, 4 Par. Cr. 166; Rex v. Wyndham, 1 Stra. 2; Nason v. Staples, 48 Me. 123; C. v. Moran, 107 Mass. 239; P. v. Smith, 1 Cal. 9; C. v. Ward, 4 Mass. 497; S. v. Freeman, 8 Iowa, 428, 74 Am. D. 317; S. v. McAllister, 25 Me. 490; Northrop v. Brush, Kirby, 108; S. v. McNally, 34 Me. 210; Withers v. S., 117 Ala. 89, 23 So. 147.

82. Rex v. Fell, 1 Ld. Raym. 424; Post, § 238.

83. Ante, § 224b.

84. See and compare Prell v. McDonald, 7 Kan. 426; C. v. Boon, 2 Gray, 74; Gano v. Hall, 42 N. Y. 67; Reg. v. Downey, 7 Q. B. 281; C. v. Henry, 7 Cush. 512; Wright v. C., 2 Rob. Va. 800; In re Romaine, 23 Cal. 585. Nor a conviction set aside, P. v. Sehorn, 116 Cal. 503, 48 P. 495.

85. Colvert v. Moore, 1 Bailey, 549. The learned judge observed: "According to the ancient common law, it would seem that one justice might supercede a warrant issued by another to compel a party to find surety of the peace; but the power is limited to that case alone, and even this is taken away in England by Stat. 21, Jac. 1, c. 8, unless upon motion made in open court, and upon sufficient sureties in a fixed sum": referring to 1 Hawk. P. C., c. 60, § 14; Bac. Abr. Supersedeas, C. This statute was said not to be of force in South Carolina; neither, because of "the evils recited in its preamble," was the prior law.

3. **Full Jurisdiction.**—If the evidence discloses to the examining magistrate that he has complete jurisdiction over the offence concurrent with the higher court, he has in some localities a discretion either to bind over the prisoner or to enter a conviction;[86] in other States, the defendant can, if he prefers, demand the full trial.[87]

§ 236. 1. **On Habeas Corpus,**—irregularities in a commitment for trial may be examined into, and the prisoner be discharged, remanded to prison, or bailed, as the case requires.[88]

2. **Whether Jurisdiction inferior.**—The court of a justice of the peace, sitting in the trial of a cause, is deemed of inferior jurisdiction.[89] "And the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears [in the record, allegations, or other papers] to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged."[90] We have seen that, within this distinction,

86. C. v. Harris, 8 Gray, 470. And see S. v. Hall, 25 Vt. 247.

87. Thomm v. S., 35 Ark. 327; In re Donnelly, 30 Kan. 191, 424, 1 P. 648, 778.

88. Geyger v. Stoy, 1 Dall. 135; C. v. The Sheriff, 7 Watts & S., 108; S. v. Randolph, 26 Mo. 213; P. v. Smith, 1 Cal. 9; Ex parte Burford, 3 Cranch, 448; C. v. Ward, 4 Mass. 497; Snowden v. S., 8 Mo. 483; P. v. McLeod, 1 Hill (N. Y.), 377, 37 Am. D. 328; S. v. Asselin, T. U. P. Charl. 184; C. v. Holloway, 5 Binn. 512; In re McIntyre, 5 Gilman, 422; Ex parte Champion, 52 Ala. 311; Ex parte Keeling, 50 Ala. 474; Evans v. Foster, 1 N. H. 347; Marriot's Case, 1 Salk. 104; Ex parte Jones, 20 Ark. 9; S. v. Best, 7 Blackf. 611; Ex parte Granice, 51 Cal. 375; P. v. Richardson, 4 Par. Cr. 656. Reviewing court may go into merits and dismiss if evidence is sufficient. Palmer v. Colladay, 18 A. D. C. 426; writ must be dismissed if evidence shows a crime was committed and that accused probably committed it. In re Levy, 8 Idaho, 53, 66 P. 806; and P. v. Crane, 94 A. D. 397, 88 N. Y. Sup. 343; S. v. Baeverstad, 12 N. D. 527, 97 N. W. 548; effect of waiver. In re Mallison, 36 Kan. 725, 14 P. 144. Compare Ex parte Terry, 71 Kan. 362, 80 P. 586; Ex parte Smith, 79 Miss. 373, 30 So. 710; P. v. McFarline, 25 A. D. 629, 49 N. Y. Sup. 599.

89. Not so, but superior, in Texas. Heck v. Martin, 75 Tex. 469, 16 Am. St. 915, 13 S. W. 51.

90. Peacock v Bell, 1 Saund. (Wms. Ed.) 73, 74; Winford v. Powell, 2 Ld. Raym. 1310; P. v. Koeber, 7 Hill (N. Y.), 39; P. v. Mal-

there is reason for holding a magistrate's examining court not to be of inferior jurisdiction.[91] Besides,—

§ 237. **Ministerial Functions.**—The magistrate, in exercising this jurisdiction, appears perhaps to act, not judicially, but ministerially; at least, he does not put forth "judicial power," within the meaning of the Constitution of the United States.[92] And still we have some authority for saying that his functions herein are judicial.[93]

§ 238. **Official Name.**—While it is proper and usual for the justice, in his mittimus and other like papers, to subscribe himself as "justice of the peace," this is believed not to be essential; but the fact, on the question arising, may be shown by averment and proof.[94] Still, contrary to this, Hawkins states, it is believed not with absolute accuracy, that the mittimus "must be in writing, under the hand and seal of the person by whom it is made, and expressing his office or authority, and the time and place at which it is made, and must be directed to the jailer, or keeper of the prison."[95]

§ 239. 1. **Not inferior.**—The result from all the foregoing is that, whether or not we assume the examining tribunal to stand on the same ground as the ordinary courts, its jurisdiction herein is not inferior.[96] Practically it is

lon, 39 How. Pr. 454; S. v. Alford (Mo. Ap. 1910), 127 S. W. 109; P. v. McLaughlin, 57 A. D. 454, 68 N. Y. 246, 15 N. Y. Cr. 337; Grant v. Camp, 105 Ga. 428, 31 S. E. 429. See, as to presumptions in case of courts of general jurisdiction, S. v. Baty, 166 Mo. 561, 66 S. W. 428; S. v. Melvern, 32 Wash. 7, 72 P. 489; post, § 664.

91. Ante, § 228 (1). S. v. Deutsch, 77 J. L. 292, 72 A. 5.

92. Ex parte Gist, 26 Ala. 156; Ex Parte Pool, 2 Va. Cas. 276. And see Prigg v. Pennsylvania, 16 Pet. 539.

93. S. v. Keyes, 75 Wis. 288, 44 N. W. 13.

94. Rex v. Goodall, Say. 129, 2 Hale P. C. 122, 123; S. v. Manley, 1 Tenn. 428. See S. v. Green, 3 Green (N. J.), 88 Ladow v. Groom, 1 Denio, 429.

95. 2 Hawk. P. C., c. 16, § 13. Signature by clerk. Jennings v. S., 13 Kan. 80. The form is now almost universally regulated by statute. S. v. Kennie, 24 Mont. 35, 60 P. 589; P. v. Hagan, 170 N. Y. 46, 62 N. E. 1086; P. v. Crane, 94 A. D. 397, 88 N. Y. S. 383; S. v. Rozum, 8 N. D. 528, 80 N. W. 477; S. v. Huegin, 110 Wis. 189, 85 N. W. 1046.

96. Boynton v. S., 77 Ala. 29. The case of Rex v. Goodall, Say.

best for the magistrate's authority to appear on the face of his mandates, yet it is not in strict law indispensable. Justices of the peace being the ordinary committing force of the country, the presumption should be in favor of their jurisdiction, the same as of the superior courts doing the general judicial business. Moreover, their acts being either fully or *quasi* ministerial, rather than judicial, their authority on other principles would seem to be provable in any way, like any other fact, rendering its appearance in the record or process unnecessary.

2. **All Statutory Directions**—must, of course, be complied with in these proceedings, or they will not be good.[97]

129, cited to the last section, is very strong. It was decided in 1754. Sayer is not a reporter of high repute, yet I see no reason to doubt his correctness in this instance. It was a *habeas corpus* case in the King's Bench. Goodall had been committed for a felony not clergyable, by a warrant signed "Thomas Longford, Mayor." It was objected that Longford was not shown by the warrant to be a justice of the peace or to have authority to commit. "But we are of opinion," said the court, "that it is not necessary that an authority to commit should appear in a warrant of commitment. In Elderton's Case, 6 Mod. 73, 75, it is laid down by Holt, C. J., that it need not appear in a warrant of commitment that the person who issued the warrant was a justice of the peace. In the case of Rex v. Talbot (Mich), 4 Geo. 2, the authority of what is laid down by Holt, C. J., in Elderton's Case was recognized; and the following distinction, which is in our opinion a very sensible one, was taken; namely, that in a conviction an authority to convict must appear, because convicting is a judicial act; but that an authority to commit need not appear in a warrant of commitment, because the issuing of such a warrant is a ministerial act. If it be not necessary that an authority to commit should appear in a warrant of commitment, the court will never intend a want of authority in the person who issued the warrant; but, until the contrary appear, will presume that he had an authority." To the like effect we read in Burn's Justice of the Peace tit. Commitment, iv. as follows: "It is said that the authority of the magistrate ought to be shown on the face of the warrant; but this, in strictness, is not absolutely necessary, for his authority may be supplied by parol evidence": referring to 2 Hawk. P. C. c. 16, § 13; 2 Hale P. C. 122; 1 Keny. 122; Mayhew v. Locke, 2 Marshall, 377. The author adds: "It is, however, usual and best to state the authority." See also S. v. Manley, 1 Tenn. 428, 429; Gurney v. Tufts, 37 Me. 130, 58 Am. D. 777; C. v. Murray, 2 Va. Cas. 504; Chase v. P. 2 Colo. 528. Warrant need not designate constable, S. v. Shirley, 233 Mo. 335, 135 S. W. 1.

97. Devine v. S., 4 Iowa, 443.

§ 239 a. 1. **Necessity of Preliminary Examination.**—Except by force of a statute, the preliminary examination is not necessary; being a mere expedient to prevent the suspected person from escaping, or for preserving the evidence, or keeping the witnesses within control.[98] But in a few of the States, legislation requires it to precede the indictment in particular cases, or in all.[99]

2. **The Magistrate's Discharge,**—on a preliminary examination, is not a bar to any sort of fresh proceedings.[1]

98. French v. P., 3 Par. Cr. 114; S. v. Oscar, 13 La. Ann. 297; Harper v. S., 7 Ohio St. 73; S. v. Bunger, 14 La. Ann. 461; S. v. Webster, 39 N. H. 96; U. S. v. Ronzone, 14 Blatch. 69; Buckley v. Hall, 215 Mo. 93, 114 S. W. 954; S. v. Moran, 216 Mo. 550, 115 S. W. 1126; S. v. Heath, 221 Mo. 565, 121 S. W. 149; Caples v. S., 3 Okla. Cr. Ap. 72, 104 P. 493; S. v. Werner, 128 La. 1, 54 So. 402. Failure to allow in murder prosecution as required by statute is a mere irregularity. S. v. Pritchett, 219 Mo. 696, 119 S. W. 386. Plea in abatement, Birmingham v. S., (Wis. 1911), 129 N. W. 670; S. v. Gotlieb (N. D. 1910), 129 N. W. 460; Heacock v. S. (Okla. Cr. Ap. 1911), 112 P. 949; Wood v. S., 3 Okla. Cr. Ap. 553, 107 P. 937; Wieden v. S., 141 Wis. 585, 124 N. W. 509; Hollibaugh v. Hehn, 13 Wyo. 269, 79 P. 1044.

99. S. v. Pritchard, 35 Conn. 319; S. v. Hanchett, 38 Conn. 35; Morrissey v. P., 11 Mich. 327; Washburn v. P., 10 Mich. 372; Turner v. P., 33 Mich. 363; Yaner v. P., 34 Mich. 286; P. v. Jones, 24 Mich. 215; S. v. Barnett, 3 Kan. 250, 87 Am. D. 471; S. v. Stevens, 36 N. H. 59; S. v. Hilton, 32 N. H. 285; S. v. Thompson, 20 N. H. 250; Montgomery v. S., 7 Ohio St. 107; Jackson v. C., 23 Grat. 919; Chahoon v. C., 20 Grat. 733; Wright v. C., 19 Grat. 626; Shelly v. C., 19 Grat. 653; Philips v. C., 19 Grat. 485; S. v. Stewart, 7 W. Va. 731, 23 Am. R. 623; S. v. Strauder, 8 W. Va. 686; Butler v. C., 81 Va. 159; Brown v. P., 39 Mich. 37; S. v. Watson, 30 Kan. 281, 1 P. 770; S. v. Spaulding, 24 Kan. 1; S. v. Smith, 13 Kan. 274; In re Mills Sing (Cal. Ap.), 110 P. 693; S. v. Farris, 5 Idaho, 666, 51 Pa. 772; S. v. McGreevey, 17 Idaho, 453, 105 P. 1047; S. v. Harvey, 214 Mo. 403, 114 S. W. 19; S. v. Pritchett, 219 Mo. 696, 119 S. W. 386.

1. New Crim. Law, I, § 1014 (2); S. v. Britton, 18 Vroom, 251; In re Garst, 10 Neb. 78, 7 N. W. 511; Ex parte Porter, 16 Tex. Ap. 321; S. v. Fox, 83 Conn. 286, 76 A. 302; Ex parte Robinson, 108 Ala. 161, 18 So. 729; Ex parte Fenton, 77 Cal. 183, 19 P. 267; Com. v. Sullivan, 156 Mass. 487, 31 N. E. 647; Gaffney v. Judge, 85 Mich. 138, 48 N. W. 478; P. v. Dillon, 197 N. Y. 254, 90 N. E. 820. Compare, P. v. Lang, 125 N. Y. S. 727.

CHAPTER XVI.

SEARCH-WARRANTS.

As to the Service—of search-warrants, see ante, §§ 208, 209, 218.[2]

§ 240. 1. **Historical—Uses.**—It is stated by Merrick, J., that search-warrants were never used to enforce private rights, but were "confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals. Even in those cases, if we may rely on the authority of Lord Coke, their legality was formerly doubted; and Lord Camden said that they crept into the law by imperceptible practice. But their legality has long been considered to be established, on the ground of public necessity; because, without them, felons and other malefactors would escape detection."[3] Hence,—

2. **Guarded—Constitutional.**—While we have search-warrants, we take special care to prevent their becoming engines of wrong; even, in most of the States, by express constitutional provisions. Thus, "every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions; all warrants, therefore, are contrary to this right if the cause or foundation of them be not previously supported by oath or affirmation, etc."[4]

3. **Person or Place.**—The common law and most of the statutes provide only for the searching, under the warrant,

2. And see C. v. Gaming Implements, 119 Mass. 332.

3. Robinson v. Richardson, 13 Gray, 454, 456, 457; Entick v. Carrington, 19 How. St. Tr. 1029, 1067; 1 Chit. Crim. Law, 64. See Boeger v. Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. 322.

4. Mass. Const. Bill of Rights. art. 14. The Constitution of the United States has a similar provision. Amendm., art. 4. See Dupree v. S., 102 Tex. 455, 119 S. W. 301; Lippman v. P., 175 Ill. 101, 51 N. E. 872; S. v. Slamon, 73 Vt. 212, 50 A. 1097, 87 Am. St. 711.

of some place or locality.[5] But in California it is held that the legislature, without violating either the State or the national Constitution, may authorize a warrant to search, in a proper case, the person of an individual.[6]

§ 241. 1. **Statutes,**—which more or less differ in our States, generally direct under what circumstances the warrant may be issued, and our constitutions keep it within bounds. The jurisdiction is commonly with justices of the peace.

2. **Stolen Goods.**—Its most frequent use is to search for stolen goods,[7] and to this it appears formerly to have been limited.[8] Some of the added uses are—

3. **Lottery Tickets and Materials**—are sometimes authorized by statute to be seized under it.[9] And this has been adjudged not unconstitutional.[10] So,—

4. **Intoxicating Liquors,**—kept for sale contrary to law,[11] are in some of the States made subjects for search-warrants,—a provision adjudged constitutional.[12]

5. For example, see the forms in 4 Chit. Crim. Law, 20-29.

6. Collins v. Lean, 68 Cal. 284, 9 P. 173. See Smith v. Jerome, 47 Misc. 22, 93 N. Y. Supp. 202, 16 N. Y. Ann. Cas. 153. See Keady v. P., 32 Colo. 57, 74 P. 892, 66 L. R. A. 353. As to search of a person without warrant.

7. Ante, § 208 (2); 2 Hale P. C. 149; Stone v. Dana, 5 Met. 98; S. v. Mann, 5 Ire. 45.

8. Entick v. Carrington, 19 How. St. Tr. 1029, 1067.

9. Collins v. Lean, 68 Cal. 284, 9 P. 173.

10. C. v. Dana, 2 Met. 329.

11. C. v. Intoxicating Liquors, 97 Mass. 334, and other cases under the same name, 103 Mass. 448, 105 Mass. 178, 105 Mass. 181, 105 Mass. 468, 105 Mass. 595, 113 Mass. 13, 115 Mass. 145, 13 Allen, 52; S. v. McCann, 59 Me. 383; S. v. Bartlett, 47 Me. 388; S. v. Stevens, 47 Me. 357; S. v. Whiskey, etc., 54 N. H. 164; S. v. Brennan's Liquors, 25 Conn. 278; Lincoln v. Smith, 27 Vt. 328; S. v. Burke, 66 Me. 127; S. v. Erskine, 66 Me. 358; Adams v. McGlinchy, 66 Me. 474; S. v. Howley, 65 Me. 100; S. v. Knowlton, 70 Me. 200; Wright v. Dressel, 140 Mass. 147, 3 N. E. 6; S. v. Intoxicating Liquors, 64 Iowa, 300, 20 N. W. 445; Hornig v. Bailey, 50 Conn. 40; C. v. Intoxicating Liquors, 122 Mass. 14; C. v. Newton, 123 Mass. 420; C. v. Intoxicating Liquors, 150 Mass. 164, 22 N. E. 628; Small v. Orne, 79 Me. 78, 8 A. 152; O'Neal v. Parker (Ark. 1907), 102 S. W. 165.

12. Allen v. Staples, 6 Gray, 491. See also, in Maine, S. v. Miller, 48 Me. 576; and also Clement v. Hunsicker, 66 Misc. 1, 122 N. Y. S. 441; S. v. Hanson, 114 Minn. 136, 130 N. W. 79.

5. **Gaming Implements**—are another subject of search-warrants.[13]

§ 242. *Form of the Search-warrant*:—

1. **Specific.**—The search-warrant should be specific in terms, general warrants having always been deemed illegal.[14]

2. **Oath.**—By the common law, and by our statutes and constitutions, this warrant can issue only on a sworn complaint.[15]

3. **The Complaint and Warrant**—are in the practice of some of our States attached; in others, not; either, it is believed, is well enough.[16] If the things to be searched for are described in the complaint, it suffices that the attached warrant directs the officer to search for those "mentioned in the above complaint."[17]

4. **Miscellaneous Points,**—adjudged in the different States. are such as that a precept commanding the officer to break and enter a dwelling-house must state an adequate cause.[18] A constable may serve a search-warrant issued on complaint of himself and another person.[19] If, on the face of the warrant, the magistrate is without jurisdiction, the officer serving it will be a trespasser.[20] In Alabama, the affidavit and warrant are insufficient if they specify no criminal charge, and describe no person, property, or

13. C. v. Gaming Implements, 119 Mass. 332; C. v. Watts, 84 Ky. 537, 2 S. W. 123; Mullen v. Mosley, 13 Idaho, 547, 90 P. 986.

14. 2 Hale P. C. 150; 2 Hawk. P. C., c. 13, §§ 10, 17; Money v. Leach, 1 W. Bl. 555, 3 Bur. 1742. As to place, S. v. Moore, 125 Iowa, 749, 101 N. W. 732; S. v. Duane, 100 Me. 447, 62 A. 80; S. v. McNulty, 7 N. D. 169, 73 N. W. 87.

15. Ante, § 240 (2); 2 Hale P. C. 150; Lippman v. P., 175 Ill. 101, 51 N. E. 872; White v. Wagar, 185 Ill. 195, 50 L. R. A. 60, 57 N. E. 26; Elsee v. Smith, 1 D. & R. 97, 2 Chit. 304; Entick v. Carrington, 19 How. St. Tr. 1029, 1067; C. v. Intoxicating Liquors, 13 Allen, 52; Bessemer v. Eidge, 162 Ala. 201, 50 So. 270.

16. S. v. Erskine, 66 Me. 358; Hornig v. Bailey, 50 Conn. 40.

17. C. v. Dana, 2 Met. 329; Dwinnels v. Boynton, 3 Allen, 310.

18. Sanford v. Nichols, 13 Mass. 286; Early v. P., 117 Ill. Ap. 608.

19. C. v. Certain Intoxicating Liquors, 6 Allen, 596. Service by person deputized. Miller v. Hogeboom, 56 Neb. 484, 76 N. W. 888.

20. S. v. Mann, 5 Ire. 45; Entick v. Carrington, 19 How. St. Tr. 1029.

place.[21] Where the informant must be a resident of the county, such residence need not be stated in the information.[22] And we have various other like matters adjudged.[23]

§ 243. 1. **Seal.**—If other warrants must be under seal, so must the search-warrant.[24]

2. **Statutory Mandates.**—It must conform to every statutory mandate;[25] as, under the Maine statute of 1853, it will be void unless it shows on its face that before issuing it the magistrate had the testimony of the witnesses reduced to writing, and sworn to.[26]

3. **Day or Night.**—Lord Hale deems it "fit" that the warrant should limit the time of search to the day.[27] But with us this has been adjudged unnecessary; for, like any other warrant, the officer without special direction will execute it at a proper time.[28]

§ 244. **Place and Thing.**—Since general warrants are unlawful,[29] the place and thing must be described,[30]—required equally by the common law, by our statutes, and by our constitutions.[31] Thus,—

§ 245. 1. **Place.**—The command must not be simply to search the "suspected place."[32] The just rule probably is so to state the place that the officer can find it without inquiring what was in the mind of the person making the

21. Thrash v. Bennett, 57 Ala. 156.

22. S. v. Blair, 72 Iowa, 591, 34 N. W. 432.

23. Downing v. Porter, 8 Gray, 539; Allen v. Staples, 6 Gray, 491; Guenther v. Day, 6 Gray, 490; C. v. Lottery Tickets, 5 Cush. 369.

24. P. v. Holcomb, 3 Par. Cr. 656; ante, § 227 (2).

25. C. v. Certain Intoxicating Liquors, 13 Allen, 52; Sanders v. S., 2 Iowa, 230; S. v. Spencer, 38 Me. 30; Hussey v. Davis, 58 N. H. 317.

26. S. v. Carter, 39 Me. 262; Jones v. Fletcher, 41 Me. 254; S. v. Staples, 37 Me. 228.

27. 2 Hale P. C. 150. As to meaning of "daytime" in a search warrant. Linnen v. Banfield, 114 Mich. 93, 4 Det. Leg. N. 96, 72 N. W. 1.

28. S. v. Brennan's Liquors, 25 Conn. 278, 284.

29. Ante, § 242 (1).

30. Bell v. Clapp, 10 Johns. 263, 6 Am. D. 339; Sanford v. Nichols, 13 Mass. 286; Grumon v. Raymond, 1 Conn. 40, 6 Am. D. 200; Frisbie v. Butler Kirby, 213; S. v. Markuson, 7 N. D. 155, 73 N. W. 87.

31. Reed v. Rice, 2 J. J. Mar. 44, 19 Am. D. 122.

32. P. v. Holcomb, 3 Par. Cr. 656, 666.

complaint, or of the magistrate; or, in the words of a learned judge, "The description of the place to be searched should be as certain in a warrant as would be necessary in a deed to convey such place."[33]

2. **Thing.**—It was adjudged sufficient to describe the property to be searched for as "three cases of misses' and women's boots, of the value of one hundred dollars; a lot of oak-tanned soles, of the value of fifty dollars; and ten sides of sole-leather of the value of forty dollars."[34] Also, "certain spirituous and intoxicating liquors, to wit, rum, gin, brandy, whiskey, wine, alcohol, and ale."[35] Where the statute authorized a search for liquors "owned or kept by any person named or described as particularly as may be," it was held that ownership in some specific person must be alleged in the information.[36]

3. **Amendments**—are in proper circumstances, or with statutory permission, permitted in search-warrants.[37]

§ 246. *Evidence obtained by Search-warrant:—*

Admissible.—The evidence procured by a search-warrant may be used against the party; not being inadmissible as an admission under duress or compulsion, or as otherwise wrongly obtained, even if the issuing of the warrant was illegal.[38]

33. May, J., in Jones v. Fletcher, 41 Me. 254, 256. And see Santo v. S., 2 Iowa, 165, 63 Am. D. 487; Meek v. Pierce, 19 Wis. 300; Dwinnels v. Boynton, 3 Allen, 310; S. v. Robinson, 33 Me. 564; C. v. Dana, 2 Met. 329; Lincoln v. Smith, 27 Vt. 328; C. v. Intoxicating Liquors, 97 Mass. 332; C. v. Intoxicating Liquors, 97 Mass. 334; S. v. Bartlett, 47 Me. 388; C. v. Intoxicating Liquors, 150 Mass. 164, 22 N. E. 628; C. v. Newton, 123 Mass. 420; Wright v. Dressel, 140 Mass. 147, 3 N. E. 6. See S. v. McNulty, 7 N. D. 169, 73 N. W. 87; S. v. Markuson, 7 N. D. 155, 73 N. W. 82; S. v. Duane, 100 Me. 447, 62 A. 80; S. v. Moore, 125 Iowa, 749, 101 N. W. 732.

34. Dwinnels v. Boynton, supra.

35. Whiskey etc., 54 N. H. 164; S. v. Madison, 23 S. D. 584, 122 N. W. 647.

36. S. v. Certain Intoxicating Liquors, 64 Iowa, 300.

37. S. v. Hall, 78 Me. 37, 2 A. 546.

38. S. v. Flynn, 36 N. H. 64. Excluding proof obtained by an unlawful search. Hedger v. S. (Wis. 1910), 128 N. W. 80; Warren v. S., 6 Ga. App. 18, 64 S. E. 111; Hartman v. U. S., 94 C. C. A. 124, 168 Fed. 30; Sherman v. S., 2 Ga. Ap. 686, 58 S. E. 1122; Younger v. S., 80 Neb. 201, 114 N. W. 170; P. v. Strollo, 191 N. Y. 42, 83 N. E. 573.

CHAPTER XVII.

THE DOCTRINE AND METHODS OF BAIL.

Compare—with chapters on Arrest, and on Preliminary Proceedings, ante, § 155 et seq., 224c et seq.

§ 247. 1. **The Subject of this Chapter**—is not purely of the criminal law, but it extends somewhat into the law of contracts. It is largely regulated by statutes, which differ in our States. What of the common law of criminal procedure there is in it, and something of the law of contracts, the author will endeavor to explain; as to the rest, the chapter will consist largely of citations of authorities. It would be injudicious to swell it to a volume with discordant statutes and their expositions.

2. **How Chapter divided.**—We shall consider, I. The Nature of Bail; II. When and before whom Bail may be given; III. The Forms of Bail; IV. Charging, Discharging, and otherwise varying the Liabilities of the Sureties.

I. *The Nature of Bail.*

§ 248. 1. **Bail defined.**—To bail an arrested person is to deliver him in contemplation of law, yet not commonly in real fact, to another or others who become entitled to his custody, and responsible for his appearance when and where agreed in fulfilment of the purpose of the arrest. Bail, the noun, denotes either the process of bailing (in which sense "bailment" is sometimes employed as its synonym), or the one or more persons who thus are made the custodians and sureties.[39]

39. And see, and compare, 4 Bl. Com. 296, 297; Bac. Abr. Bail in Criminal Causes, 2 Hawk. P. C. c. 15, §§ 2, 3; Lee v. S., 51 Miss. 665; C. v. Bronson, 14 B. Monr. 361; S. v. Davis, 27 Utah, 368, 75 P. 857;

2. **Mainprise**—is a word almost obsolete in the modern law. It means nearly the same as bail, from which, says Hawkins, its "chief if not the only difference" is, "that a man's mainpernors are barely his sureties, and cannot justify the detaining or imprisoning of him themselves in order to secure his appearance," as bail may lawfully do.[40] It does not concern us in this chapter.

§ 249. **Powers of Bail.**—One under bail may be detained by his sureties "and enforced to appear according to the condition of the recognizance, or may be brought by them before the justice of peace, by whom he shall be committed unless he find new sureties."[41] So that, in practice, if they become fearful of deception, they may personally and without a warrant[41a] arrest him, doing no violence unless resisted, or they may depute another for the purpose. Yet the deputy cannot substitute an agent of his own; he may simply employ the help of others, which must be rendered in his actual or constructive presence.[42] Hence, also,—

§ 250. 1. **Surrender Principal.**—Bail may at any time surrender the principal, and so discharge themselves.[43] The

Nicholls v. Ingersoll, 7 Johns. (N. Y.) 145; S. v. Aubrey, 43 La. Ann. 188, 8 So. 440; S. v. Dwyer, 70 Vt. 96, 39 A. 629; Worthen v. Prescott, 60 Vt. 68, 11 A. 690; S. v. Western Surety Co., 26 S. D. 170, 128 N. W. 173.

40. 2 Hawk. P. C. c. 15 §§ 2, 3.

41. Ib., § 3. Accused out on bail is in custody of his sureties, S. v. Boasberg, 124 La. 289, 50 So. 162; In re Opinion of Justices, 201 Mass. 609, 89 N. E. 174.

41a. S. v. Cunningham, 10 La. Ann. 393.

42. S. v. Mahon, 3 Harring.(Del.) 568; Nicolls v. Ingersoll, 7 Johns. 145; Pease v. Burt, 3 Day, 485; S. v. Lazarre, 12 La. Ann. 166; Kellogg v. S., 43 Miss. 57. The arrest may be made at any time or place, even on Sunday, in a court-room, or in another State, and the doors of the castle may be broken to effect it, and the sheriff be required to assist therein. Ib.; C. v. Brickett, 8 Pick. 138; Read v. Case, 4 Conn. 166; Anonymous, 6 Mod. 231; Smith v. Catlett, 1 Cranch C. C. 56; S. v. Lingerfelt, 109 N. C. 775, 14 S. E. 75, 14 L. R. A. 675. In matter of prudence, and as affecting the rights and duties of third persons, the bail making the arrest should have in possession, and exhibit when occasion calls, a duly attested copy of the recognizance. In some States, this is required by statute. S. v. Beebe, 13 Kan. 589, 19 Am. R. 93. I am not aware that it is otherwise essential, but I have before me no case on the question.

43. Harp v. Osgood, 2 Hill (N. Y.), 216; S. v. Lazarre, 12 La. An.

surrender must be to an official person having authority to take charge of him; differing, therefore, with the circumstances, and the statutes of the particular State. Not generally can it be made to the committing magistrate;[44] for his functions in the case are at an end.[45] Ordinarily it may be to the sheriff,[46] or his deputy,[46a] though the South Carolina Court once held that it could not be to a deputy sheriff, being without authority either to commit or bail him.[47] In Kentucky, it may be made to the Circuit Court, if in session; but if the term has not arrived, then to the tribunal by which he was sent up for trial.[48] The surrender is perfected only when the principal is taken charge of or accepted.[49]

2. **Habeas Corpus for Surrender.**—In proper circumstances, the court in aid of bail will order the principal, if in confinement, to be brought in for surrender on *habeas corpus*.[50]

3. **Common Law—Statutes.**—Bail was known to the ancient common law.[51] But early and late statutes in Eng-

166; S. v. Meyers, 61 Mo. 414; S. v. Rollins, 52 Ind. 168; S. v. Rosseau, 39 Tex. 614; Mitchell v. C., 12 Bush, 247; Hughes v. S., 28 Tex. Ap. 499; Hangsleben v. P., 89 Ill. 164. As to surrender after forfeiture. Com. v. Johnson, 3 Cush. (Mass.) 454. A surrender by one of several sureties, absolving him, frees also the others. S. v. Doyal, 12 La. An. 653; McNeal v. Van Duser, 142 Mich. 593, 12 Det Leg. N. 828, 105 n. W. 1109.

44. Stegars v. S., 2 Blackf. 104. But see S. v. Le Cerf, 1 Bailey, 410.

45. Ante, § 234 B. (4).

46. Stegars v. S., supra; Lee v. S., 51 Miss. 665; Kellogg v. S., 43 Miss. 57.

46a. Carter v. S., 43 Ark. 132; Ward v. Colquitt, 62 Ga. 267.

47. S. v. Le Cerf, supra.

48. C. v. Bronson, 14 B. Monr. 361.

49. C. v. Ray, cited 2 Met. Ky. 386; C. v. Coleman, 2 Met. Ky. 382; Anonymous, 1 Salk 105. See also, as to the mode of making the surrender, Rountree v. Waddill, 7 Jones (N. C.), 309; Sternberg v. S., 42 Ark. 127; Roberts v. S., 4 Tex. Ap. 29; U. S. v. Stevens, 16 Fed. 101; Arteaga v. Conner, 88 N. Y. 403; S. v. Trahan, 31 La. An. 715; Patillo v. S., 9 Tex. Ap. 456; Bonner v. Com., 27. Ky. L. R. 652, 85 S. W. 1196.

50. Comstock v. Seagraves, 1 Story, 546; U. S. v. French, 1 Gall. 1, Fed. Cas. 15165; Farrel v. Hawley, 78 Conn. 150, 61 A. 502.

51. Reeves Hist. Eng. Law (3d Ed.), 196; Bac. Abr. Bail in Criminal Causes, A. Bail ordinarily is a constitutional right which the Legislature should not abridge by

land greatly regulated it there; and some of them are common law with us. By the English authors, especially by Hawkins, they are well explained.[52] And still our differing American statutes constitute our leading guides.

II. *When and before whom Bail may be given.*

§ 251. *Before what Officer or Court:—*

1. **The Sheriff,**—anciently, possessing judicial with ministerial powers, was the principal bailing officer.[53] In many of our States he may take bail;[54] in others, not.[55]

2. **The Judges.**—In general, all judges of the superior courts, especially those authorized to issue the writ of *habeas corpus*, whether in court or chambers, may grant bail in criminal cases.[56] So, the power to hear an accusa-

burdensome rules as to residence of sureties, and location and value of the property. Ex parte Ruef. (Cal. 1908), 97 Pac. 89.

52. 2 Hawk. P. C. c. 15.

53. 2 Hawk. P. C. c. 15, § 25-31, 2 Hale P. C. 128, 136; Bac. Abr. Bail in Criminal Causes, A.; Anonymous, 6 Mod. 179.

54. Kellogg v. S., 43 Miss. 57; McClure v. Smith, 56 Ga. 439; Kearns v. S., 3 Blackf. 334; Moss v. S., How. (Miss.) 298; Dickinson v. V. Kingsbury, 2 Day, 1; S. v. McKeown, 12 La. An. 596; McCole v. S., 10 Ind. 50; C. v. Reed, 3 Bush, 516; Merrill v. S., 46 Ala. 82; Overaker v. S., 4 Sm. & M. 738; Shreeve v. S., 11 Ala. 676; S. v. Wilson, 12 La. Ann. 189; S. v. Edwards, 4 Humph. 226; S. v. Jenkins, 24 Mo. Ap. 433; Parkinson v. S., 16 Lea, 132; Ellis v. S., 10 Tex. Ap. 324; Cooper v. Rivers (Miss. 1909), 48 So. 1024; S. v. Austin, 141 Mo. 481, 43 S. W. 165; Baldwin v. S., 126 Ind. 24, 25 N. E. 820; McKie v. S., 74 Kan. 621, 85 P. 827; Ex parte Wasson, 50 Tex. Ap. 361, 97 S. W. 103.

55. S. v. Walker, 1 Misso. 546; Rupert v. S., 20 Colo. 424, 38 P. 702. And see further, as to the sheriff bailing, Jacquemine v. S., 48 Miss. 280; S. v. Miller, 31 Tex. 564; S. v. Howell, 11 Misso. 613; Antonez v. S., 26 Ala. 81; S. v. Hill, 3 Ire. 398; S. v. Horn, Meigs, 473; Gray v. S., 5 Pike, 265; Moore v. S., 28 Ark. 480; S. v. Gordon, 18 La. An. 528; Gray v. S., 43 Ala. 41; Roberts v. Brown, 43 Tex. Civ. App. 206, 94 S. W. 338; S. v. Crosswhite, 195 Mo. 1, 93 S. W. 247 (In misdemeanor but not in felony).

56. Ante, § 234a (4), 236, 1 Gude Pr. 275; Rex v. Greenwood, 2 Stra. 1138; P. v. Town, 3 Scam. 19; P. v. Perry, 8 Abb. Pr., n. s., 27; S. v. Everett, Dudley S. C. 295; P. v. Smith, 1 Cal. 9; Ex parte Tayloe, 5 Cow. 39; S. v. Abbot, R. M. Charl. 244; S. v. Hill, 3 Brev. 89; C. v. Semmes, 11 Leigh, 665; Snowden v. S., 8 Mo. 483; Finch v. S., 15 Fla. 633; Holley v. S., 15 Fla. 688;

tion carries with it the jurisdiction over bail therein.[57] In some circumstances and localities, a judge not competent to sit in a cause cannot pass upon bail.[58]

3. **A Justice of the Peace,**—and in Federal Courts a United States Commissioner [58a] while in the exercise of a jurisdiction in a cause, can take bail as incident thereto.[59] And by the statutes in some of the States his authority extends somewhat further.[60] But he has not the full power to accept bail in cases of felonies possessed by the judges of the higher courts.[61]

4. **Unauthorized Officer.**—Bail given before an officer not authorized to receive it is void.[62]

S. v. Wilson, 12 La. Ann. 189; Ex parte Croom, 19 Ala. 561; P. v. Rutan, 3 Mich. 42; S. v. Zwifle, 22 Mo. 467; C. v. Keeper of Prison, 2 Ashm. 227; Luckett v. S., 51 Miss. 799; Adair v. S., 1 Blackf. 200; Street v. S., 43 Missis. 1; S. v. Schweiter, 27 Kan. 499; U. S. v. Volz, 14 Blatch. 15; S. v. Recorder, 45 La. An. 309, 12 So. 142; In re Durant, 60 Vt. 176, 12a. 650; S. v. Vette, 179 Mo. 408, 78 S. W. 603; Ter. v. Allen, 15 Okl. 417, 82 P. 574, 575.

57. P. v. Van Horne, 8 Barb. 158; Ex parte Ryan, 44 Col. 555; S. v. Dawson, 6 Ohio, 251; Crandall v. S., 6 Blackf. 284; Schultze v. S., 43 Md. 295; C. v. Field, 11 Allen, 488; P. v. Shattuck, 6 Abb. N. Cas. 33. And see S. v. Fifth District Judge, 32 La. An. 315.

58. Powell v. S., 15 Ohio, 579; S v. Montgomery, 7 Blackf. 221; Paine v. S., 7 Blackf. 206; S. v. Ramsey, 23 Mo. 327; S. v. Nelson, 28 Mo. 13; Bowman v. C., 14 B. Monr. 390. And see Elliott v. Dudley, 8 Mich. 62; S. v. Jones, 100 N. C. 438, 6 S. E. 655; S. v. McCoy, 1 Bax. 111; Ex parte Hung Sin, 54 Cal. 102.

58a. U. S. v. Louis, 149 Fed. 277; U. S. v. Dunbar, 27 C. C. A. 488, 83 Fed. 151; Hallett v. U. S., 63 Fed. 817; U. S. v. Sauer, 73 Fed. 671.

59. Ante, § 234a, 234 b (4); Anonymous, 6 Mod. 179; Anonymous, 11 Mod. 51; S. v. Toups, 44 La. An. 905, 11 La. 528; not after he has lost jurisdiction. Reardon v. P., 123 Ill. Ap. 81; Ex parte Wasson, 50 Tex. Cr. Ap. 361, 97 S. W. 103.

60. Moore v. C., 6 Watts & S. 314.

61. Hamlett v. C., 3 Grat. 82; C. v. Otis, 16 Mass. 198; C. v. Cheney, 6 Mass. 347; C. v. Keeper of Prison, 2 Ashm. 227; Steel v. C., 7 Watts, 454; S. v. McGunnegle, 3 Mo. 402; U. S. v. Faw, 1 Cranch C. C. 486, Fed. Cas. 15,078; Smith v. S., 86 Miss. 315, 38 So. 319.

62. Dickenson v. S., 20 Neb. 72, 29 N. W. 184; Clink v. Russell, 58 Mich. 242, 25 N. W. 175; S. v. Winninger, 81 Ind. 51; S. v. McCown, 24 W. Va. 625; Evans v. S., 63 Ala. 195; U. S. v. Hudson, 65 Fed. 68; Cooper v. S., 23 Ark. 278; contra holding the bond valid at common

§ 252. *In what Cases:*—

1. **Differences.**—There are slight judicial differences, to appear as we proceed, as to the principles on which bail should be awarded. Thus, assuming the court to have the power,—

2. **Denied or not.**—It was by Erle, J., laid down in England that bail should not be granted where "the crime is of great magnitude, the punishment of a high nature, and the evidence of crime clear;" while, "if any one of these requisites be wanting, the court will exercise its discretion in the matter."[63] Hence, by those who proceed on this principle,—

3. **After Conviction.**—It is sometimes broadly laid down that there can be no bail after a verdict of guilty. Even where in a murder case such verdict was doubtful, the judges would not accept bail while holding it under advisement.[64] And during the pendency of proceedings for the reversal of a conviction for the misdemeanor of a forcible entry, bail was denied.[65] In another case of like misdemeanor, "Lord Kenyon said that unless the prosecutor consented to the defendant's remaining out on bail, it was a matter absolutely of course that he should be committed: the court had no discretion to exercise, and the practice was too well settled to admit of argument."[66] Still,—

law. Dennard v. S., 2 Ga. 137; Jones v. Gordon, 82 Ga. 570, 9 S. E. 782; Creekmore v. Com., 5 Bush (Ky.), 312; S. v. Houston, 74 N. C. 549; S. v. Crosswhite, 195 Mo. 1, 93 S. W. 247.

63. Reg. v. Barronet, Dears. 51, 60, 1 Ellis & B. 1, 16 Eng. L. & Eq. 361. See Ruston v. S., 15 Tex. Ap. 324; Ex parte Coldiron, 15 Tex. Ap. 464; Reg. v. Butler, 14 Cox C. C. 530.

64. Rex v. Morgan, 1 Bulst. 84, 88. "A man convicted of felony is not bailable, for bail is allowed when it is indifferent or doubtful whether the person accused be guilty or not; but, as to him who is convicted, two juries have passed upon him, and it is evident that he is guilty." Anonymous, Jenk. Cent. 219, 2 Dy. 179, pl. 42. See also Rex v. Keat, 1 Salk. 103, 12 Mod. 102, 5 Mod. 288. See Ex parte Schriber, 19 Ida. 531, 114 P. 29.

65. Reg. v. Layton, 1 Salk. 106, s. c., nom. Reg. v. Leighton, Fort. 39; Howerton v. Com. (Ky. 1909), 122 S. W. 173; Lindsey v. S., 59 Tex. Cr. App. 273, 128 S. W. 386.

66. Rex v. Waddington, 1 East, 143, 159.

§ 253. 1. **Sick.**—Where one convicted of libel was sick, the court said: "The offence is so great that an adequate punishment may endanger his life, and to lessen the judgment would be an ill precedent; therefore bail him for the present, and we will give judgment when he is better."[67] And—

2. **The Later Doctrine**—in misdemeanor cases seems to be, in England, that if probably the defendant's objections after verdict may prevail, the court will accept bail;[68] yet not as of course, even where bail was his right before verdict.[69] Thereupon, since the result of a litigation can never be known in advance, as well as for other obvious reasons, the American courts accept bail after the jury's finding of guilty in cases not capital, when a sound and cautious discretion prompts, though not so freely as before verdict.[70] This more merciful conclusion has in some of our States been aided by express legislation.[71]

§ 254. 1. **After Sentence**—there cannot ordinarily be bail; for it would take away the punishment itself. But there may be such proceedings for the reversal of the judgment as, in justice, should demand the acceptance of bail in the meantime. In one case, on steps to get rid of the sentence for a minor misdemeanor, the court admitted the

67. Rex v. Bishop, 1 Stra. 9. As to sickness, see post, §§ 256, 259. Sickness of one charged with capital crime. Ex parte Smith, 2 Okla. Cr. Ap. 24, 99 Pac. 893.

68. Reg. v. Harris, 4 Cox C. C. 21.

69. Reg. v. Bird, 5 Cox C. C. 11, 19, 2 Eng. L. & Eq. 439.

70. Ex parte Dyson, 25 Miss. 356; Corbett v. S., 24 Ga. 391; S. v. Connor, 2 Bay, 34; S. v. Daniel, 8 Ire. 21; S. v. Ward, 2 Hawks, 443, 447; Ex parte Hoge, 48 Cal. 3; P. v. Perdue, 48 Cal. 552; Davis v. S., 6 How. Missis. 399; S. v. Hill, 3 Brev. 89; P. v. Lohman, 2 Barb. 450; P. v. Bowe, 58 How. Pr. 393; S. v. Levy, 24 Minn. 362. See S. v. Vion, 12 La. An. 688; Com. v. Myers, 137 Pa. St. 407, 21 A. 246; Ford v. S., 42 Neb. 418, 60 N. W. 960; and see as to constitutional question. McKane v. Durston, 153 U. S. 684, 14 S. Ct. 914, 38 L. Ed. 867; In re Boulter, 5 Wyo. 329, 39 P. 875; S. v. Crocker 5 Wyo. 385, 40 P. 681; S. v. McFall, 35 S. C. 595, 14 S. E. 289. As to re-arrest after bail. S. v. Lance, 149 N. C. 551, 63 S. E. 198; Walsh v. U. S., 99 C. C. A. 134, 174 Fed. 621.

71. See Clawson v. U. S., 113 U. S. 143, 5 S. Ct. 393; U. S. v. Louis, 149 Fed. 277.

party to bail; "being of opinion that if the conviction was confirmed, they could commit him in execution for the residue of the time."[72] In another case, bail on a writ of error "was denied; though there was an apparent error in the record, and though it was formerly the practice to bail in such case; for, *per curiam,* we ought not to enlarge a prisoner in execution."[73] Therefore it is perhaps the common law doctrine that one committed in execution of sentence cannot have bail, even while proceeding for its reversal. But it is now otherwise in England under recent statutes, which allow bail in these circumstances,[74] and so it is in many or most of our States.[75]

2. **The Finding of an Indictment**—is a significant step in the proceedings, rendering the court less ready to grant bail than before.[76]

§ 255. *In Felony and Treason:*—

1. **The Danger of Escape**—is the only just ground for denying bail to one accused of any crime, yet not convicted.

72. Rex v. Reader, 1 Stra. 531. One in execution for a fine, on conviction of riot, was enlarged on recognizing to prosecute his writ of error with effect or to pay his fine; "though the court did all agree he could not be taken in execution again; and here was cited the case of The King v. Legier, where Lord Hale refused to take bail, he being in execution, and having brought his writ of error, unless he brought the money into court." Rex v. Saltash, 2 Show. 93.

73. Anonymous, 3 Salk. 58, Vent. 2. And see Rex v. Brooke, 2 T. R. 190. The federal circuit Court of Appeals has no power to admit to bail or to continue bail after affirming a judgment of conviction, but may defer sentence for a reasonable time. Walsh v. U. S., 101 C. C. A., 378, 177 Fed. 208.

74. Stats. 8 & 9 Vict. c. 68, § 1, and 16 & 17 Vict. c. 32, § 1; Archb. P. & Ev. (13th Lond. Ed.) 169; Dugdale v. Reg. (Dears.) 254, 2 Ellis & B. 129, 20 Eng. L. & Eq. 86; Dugdale v. Reg., 24 Law J., n. s., M. C. 55, 29 Eng. L. & Eq. 134.

75. P. v. Lohman, 2 Barb. 450; P. v. Folmsbee, 60 Barb. 480; Miller v. S., 15 Fla. 575. See Dempsey v. P., 5 Par. Cr. 85; Jung Goon Jow v. U. S., 13 Ariz. 255, 108 P. 490; Ex parte Schriber, 19 Ida. 531, 114 P. 29.

76. Reg. v. Chapman, 8 Car. & P. 558; Rex v. Mohun, Holt, 84, Skin. 683; P. v. Tinder, 19 Cal. 539, 81 Am. D. 77; Lynch v. P., 38 Ill. 494; Zembrod v. S., 25 Tex. 519; Ex parte Heffren, 27 Ind. 87; Ex parte Vaughan, 44 Ala. 417; Reg. v. Langley, 4 Cox C. C. 157; Ex parte Mosby, 31 Tex. 566, 98 Am. D. 547;

But something of such danger exists in every case, and it increases with the severity of the punishment and the probability of a conviction. Always, therefore, these two elements should, in combination, be taken into the account on the questions of accepting bail and the amount.[77] And where the probabilities of flight are overwhelming, there should be no bail.[78] Thus,—

2. **A Capital Crime**,—with guilt and conviction certain, is of this sort;[79] for, in the language of Scripture, "all that a man hath will he give for his life." Still,—

§ 256. 1. **All Offences**—are, by the common law as now prevailing in a part of our States, bailable, not excepting treason and the capital and other felonies; though these high crimes are so only in the discretion of the court, not of right.[80] But—

2. **Discretion.**—It is the common rule for the exercise of this discretion, to refuse bail in a capital case;[81] and

S. v. Brewster, 35 La. An. 605. And see P. v. Clews, 14 Hun, 90; post, § 256, note.

77. P. v. Van Horne, 8 Barb. 158, 165, 166; In re Barronet, 1 Ellis & B., 1 Dears. 51; In re Robinson, 23 Law J. Q. B. 286; Reg. v. Scaiffe, 5 Jur. 700; P. v. Cunningham, 3 Par. Cr. 520; Rex v. Baltimore, 4 Bur. 2179; In re Taylor, 5 Con. (N. Y.) 90; Ruston v. S., 15 Tex. Ap. 324.

78. P. v. Dixon, 4 Par. Cr. 651; U. S. v. Lee, 170 Fed. 613.

79. Ex parte Brown, 65 Ala. 446; In re Troia, 64 Cal. 152, 28 P. 231; Ex parte Kendall, 100 Ind. 599; Ex parte Holland, 20 Okla. Cr. Ap. 581, 100 P. 505; Ex parte Darter (Tex. Cr. Ap.), 38 S. W. 770.

80. Reg. v. Barthelemy, Dears 60, 61; Rex v. Higgins, 4 O. S. U. C. 83; Harvey's Case, 10 Mod. 334; Danby's Case, Skin. 56; Stafford's Case, T. Raym. 381; U. S. v. Hamilton, 3 Dall. 17; U. S. v. Stewart, 2 Dall. 343; U. S. v. Burr, 1 Burr's Trial, 306-312; Rex v. Wyndham, 1 Stra. 2; S. v. McNab, 20 N. H. 160; Rex v. Delamere Comb. 6, 111; Rex v. Pepper Comb. 298; Rex v. Yates, 1 Show. 190; Watson's Case, 1 Salk. 106; Farington's Case, T. Jones, 222; Anonymous, Lofft, 281; P. v. Hyler, 2 Par. Cr. 570; Page v. Price, 3 Salk. 57; S. v. Hill, 3 Brev. 89, 1 Tread. 242; S. v. Rockafellow, 1 Halst. 332; Foley v. Breese, 31; Ex parte Bryant, 34 Ala. 270; P. v. Van Horne, 8 Barb. 158; Reg. v. Barronet, Dears. 51, 1 Ellis & B. 1, 16 Eng. L. & Eq. 361. Ex parte Ruef, 8 Cal. Ap. 468, 97 P. 89; S. ex rel. Mollineaux v. Madison County Court, 136 Mo. 323, 37 S. W. 1126; Jernagin v. S., 118 Ga. 307, 45 S. E. 411.

81. Rex v. Kirk, 12 Mod. 309; Rex v. Carter, 7 Mod. 172; Rex v.

where the guilt is plain,—as, if the prisoner acknowledges it,[82]—this rule is nearly or quite imperative.[83] But in exceptional circumstances, if there is doubt of the prisoner's guilt,[84] and especially if confinement will endanger his life,[85] the court will release him on bail, even in a capital case.[86]

3. **In Non-capital Felonies,**—bail is, under the common-law rules, more freely granted, yet still cautiously and not as of course.[87]

Acton, 2 Stra. 851; Rex v. Greenwood, 2 Stra. 1138; Reg. v. Chapman, 8 Car. & P. 558; U. S. v. Stewart, 2 Dall. 343; Florida v. Mullin, 3 N. Y. Leg. Obs. 210; P. v. Tinder, 19 Cal. 539, 81 Am. D.,77; Martin v. S. (Miss. 1910), 52 So. 258; Ex parte Johnson, 60 Tex. Cr. Ap. 50, 131 S. W. 316.

82. Reg. v. Barronet, Dears. 51, 56, 57, 1 Ellis & B. 1, 16 Eng. L. & Eq. 361.

83. Moore v. S., 31 Tex. 572; Street v. S., 43 Miss. 1; Carr v. S., (Ark. 1909), 122 S. W. 631; Ex parte Westmoreland, 2 Okla. Cr. Ap. 512, 103 P. 370; Ex parte Nathan (Fla. 1908), 50 So. 38.

84. Ante, § 255; post, § 257; P. v. Lohman, 2 Barb. 450; Green v. C., 11 Leigh, 677; Ex parte Bates, 29 Tex. Ap. 38; Ex parte Hope, 29 Tex. Ap. 189; Ex parte Hock, 68 Ind. 206; Ex parte Bomar, 9 Tex. Ap. 610; Ex parte Matlock, 13 Tex. Ap. 227; Ex parte Floyd, 60 Miss. 913; Ex parte Randon, 12 Tex. Ap. 145; Ex parte Beacom, 12 Tex. Ap. 318; Ex parte Williams, 18 Tex. Ap. 653; Ex parte Nathan (Fla. 1908), 50 So. 38.

85. C. v. Semmes, 11 Leigh, 665; U. S. v. Jones, 3 Wash. C. C. 224; Archer's Case, 6 Grat. 705. And see Thomas v. S., 40 Tex. 6; Lester v. S., 33 Ga. 192; Post, § 259; Ex parte Smith, 2 Okla. Cr. Ap. 24, 99 P. 893.

86. **After or before indicted.** The finding of an indictment sometimes varies the question as to this. Ex parte Goans, 99 Mo. 193, 17 Am. St. 571, 12 S. W. 635. See ante, § 254 (2). Thus, it was once said: "If a man be found guilty of murder by the coroner's inquest, we sometimes bail him; because the coroner proceeds upon depositions taken in writing, which we may look into. Otherwise, if a man be found guilty of murder by a grand Jury; because the court cannot take notice of their evidence, which they by their oath are bound to conceal." Mohun's Case, 1 Salk. 104. And see the next section. Also see Rex v. Magrath, 2 Stra. 1242; Rex v. Dalton, 2 Stra. 911; where likewise the same distinction is made. As to which, see post, § 257. Ex parte Nathan (Fla. 1908), 50 So. 38.

87. Ex parte Tayloe, 5 Cow. 39; P. v. Van Horne, 8 Barb. 158; Summerfield v. C., 2 Rob. (Va) 767; Rex v. Carter, W. Kel. 159; Rex. v. Massey, 6 M. & S. 108; Rex v. Jones, 1 B. & Ald. 209; S. v. Mairs, Coxe, 335; Ex parte Andrews, 19 Ala. 582; Dunlap v.

§ 257. What look into.—The leading consideration being the probability of guilt, the court will look into the depositions taken before the coroner [88] and the committing magistrate,[89] and into any mistrial of the question.[90] As to the evidence before the grand jury, we have seen [91] that it is private, so judicial notice of it is not possible. But for some other purposes,[92]—and, on principle, for the purpose of bail,—the doings of a grand jury may be inquired into, and even the testimony of a juror received. The difficulty, if it is one, has been overcome by legislation in some of our States; and in one way or another it seems to have become the American doctrine that, even after indictment found, the facts as to probable guilt may be inquired into on an application for bail.[93]

§ 258. *Other Considerations:*—

Delay in Prosecution.—One arrested for crime cannot in

Bartlett, 10 Gray, 282, 69 Am. D. 320; Anonymous, Lofft, 554; Rex v. Baltimore, 4 Bur. 2179; Rex v. Booth, Keny. 172; Tyler v. Greenlaw, 5 Rand, 711; S. v. McNab, 20 N. H. 160; Bennett v. P., 94 Ill. 581; S. v. Lance, 149 N. C. 551, 63 S. E. 198.

88. Ante, § 256 (2), note; Rex v. Pepper, Comb. 298, where it is said: "We ought to have the examinations (before the coroner's inquest) before us; and if it appear to be a case of hardship, we may bail." See also S. v. Dew, Taylor, 142.

89. Rex v. Horner, Cald. 295, 1 Leach, 270.

90. Ex parte Goans, 99 Mo. 193, 17 Am. St 571, 12 S. W. 635; Webb v. S., 4 Tex. Ap. 167; post, § 262 (2).

91. Ante, § 256 (2), note.

92. Post, § 857-859.

93. Lumm v. S., 3 Ind. 293; C. v. Rutherford, 5 Rand. 646; Ex parte Tayloe, 5 Cow. 39; Ex parte Bramer, 37 Tex. 1; Lynch v. P., 38 Ill. 494; Street v. S., 43 Missis. 1; Ex parte Hammock, 78 Ala. 414. 572; Ex parte Rhear, 77 Ala. 92; Ex parte Hammock, 78 Ala. 414. But see Hight v. U. S., Morris, 407, 43 Am. D. 111. In South Carolina, on a motion for leave to give bail in a criminal case, the court may hear and consider affidavits, although they go to contradict the finding of a jury. S. v. Hill, 1 Tread. 242. The same is held in New York in cases where the commitment was by a coroner; but this would be so even in England. P. v. Beigler, 3 Par. Cr. 316. Still, after indictment found, the depositions taken before the committing magistrate cannot be looked into. P. v. Dixon, 4 Par. Cr. 651. And see P. v. Hyler, 2 Par. Cr. 570; S. v. Wicks, R. M. Charl. 139.

natural justice be detained a needless time awaiting trial.[94] And it was early held, even in felony, to be a ground for allowing bail that the prosecutor does not bring on the trial as soon as he might.[95] So, where "the commitment was for high treason, yet there was no prosecution, and a sessions was past," bail was granted.[96] But the lapse of a single term, when no oppression attends it, will not alone move the court thereto;[97] nor, *à fortiori,* will the continuance of the case for want of witnesses.[98] Still, a fact of this general sort may in special circumstances induce the court to bail the prisoner, or even discharge him absolutely, or on his own recognizance.[99] But a postponement at his request is no ground for bail.[1] That the terms of the court are far apart does not authorize it to interpose in this way.[2]

§ 259. Sickness of the Prisoner,[3]—if the confinement does not aggravate it, will not entitle him to bail, especially in a very high crime.[4] But danger to his life from the imprisonment,[5] or in some cases to his health,[6] or a famine in

94. Compare with post, § 951-951f.

95. Rex v. Bell, Andr. 64.

96. Fitzpatrick's Case, 1 Salk. 103. So, where the party had lain in prison without prosecution a year. Rex v. Wyndham, 1 Stra. 2, 4. Also, two terms. Crosby's Case, 12 Mod. 66. A woman indicted for murdering her husband was permitted bail where the "affidavits of the fact" showed the prosecution to be malicious; "and there being nothing done either upon the indictment or coroner's inquest, or at the assizes; and the man being dead above a year." Barney's Case, 5 Mod. 323. And see S. v. Hill, 3 Brev. 89. For the like doctrine, in some instances aided by statutes, see Ex parte Croom, 19 Ala. 561; Ex parte Stiff, 18 Ala. 464; Aylesbury's Case, 1 Salk. 103.

97. S. v. Abbot, R. M. Charl. 244; Logan v. S., 3 Brev. 415. And see Anonymous, 2 Lewin, 260; Rex v. Parish, 7 Car. & P. 782; Reg. v. Orbell, 6 Mod. 42.

98. U. S. v. Jones, 3 Wash. C. C. 224; Ex parte Campbell, 20 Ala. 89.

99. Rex v. Osborn, 7 Car. & P. 799; Rex v. Crowe, 4 Car. & P. 251; Reg v. Hibburd, 1 Car. & K. 461; C. v. Phillips, 16 Mass. 423.

1. U. S. v. Stewart, 2 Dall. 343. And see P. v. Hartwell, 2 Par. Cr. 32.

2. S. v. Villere, 41 La. Ann. 572, 6 So. 827. And see Hernandez v. S., 4 Tex. Ap. 425.

3. Ante, § 253 (1), 256 (2).

4. Rex v. Wyndham, 1 Stra. 2, 4.

5. Aylesbury's Case, 1 Salk. 103, Holt, 84; U. S. v. Jones, 3 Wash. C. C. 224.

6. Rex v. Aylesbury, Holt, 84; Harvey's Case, 10 Mod. 334.

the jail,[7] will more or less, according to the circumstances, incline the court to bail him.

§ 260. 1. **In Misdemeanor,**—differing from felony, the common law doctrine allows bail, not in the mere judicial discretion, but ordinarily as of right.[8] Hence,—

2. **Guilt.**—One held for a misdemeanor may give bail equally whether guilty or not. Yet the question of his probable guilt is material to the amount, as furnishing or not a motive to elude justice.[9] Hence also,—

3. **Sureties.**—If sureties pecuniarily sufficient are offered, the magistrate should not reject them from dislike to their politics or from their personal character.[10]

§ 261. *Constitutional and Statutory Modifications*:—

1. **Excessive.**—By our national Constitution, "excessive bail shall not be required."[11] This provision does not bind the States;[12] yet it affirms the general doctrine.[13]

2. **Our State Constitutions**—are not quite uniform, but most have a clause in substance that "all prisoners shall, before conviction, be bailable by sufficient sureties, except for capital offences where the proof is evident or the presumption great."[14] Hence,—

7. Herbert's Case, Latch, 12.

8. Reg. v. Badger, 4 Q. B. 468, 7 Jur. 216, 6 Jur. 994; P. v. Kennedy, 2 Par. Cr. 312; P. v. Johnson, 2 Par. Cr. 322; Dunlap v. Bartlett, 10 Gray, 282, 69 Am. D. 320, with which compare Ex parte Andrews, 19 Ala. 582. Though the commitment need not in terms charge that the wrong was done "feloniously," the court must be able to see from it that it was felony, or, under the Habeas Corpus Act, bail the prisoner. Rex v. Judd, 2 T. R. 255, 256, s. c., 1 Leach, 484, 2 East P. C. 1018. But a statute, creating an offense, may be in terms to preclude bail. Rex v. Dunn, 5 Bur. 2640; In re Comolli, 78 Vt. 337, 63 A. 184.

9. Reg. v. Scaife, 9 Dowl. P. C. 553, 5 Jur. 700.

10. Reg. v. Badger, 4 Q. B. 468, Dav. & M. 375. **The Sureties.** See further, as to who shall be accepted as sureties, P. v. Ingersoll, 14 Abb. Pr., n. s., 23; Boren v. Darke, 21 Ohio St. 311.

11. Const. U. S. Amendm., art 8.

12. C. v. Hitchings, 5 Gray, 482, 485; Loeb v. Jennings, 133 Ga. 796, 67 S. E. 101.

13. For something as to what is excessive bail, see McConnel v. S., 13 Tex. Ap. 390; Ex parte Hutchings, 11 Tex. Ap. 28; Ex parte Duncan, 53 Cal. 410.

14. Ex parte Wray, 30 Missis. 673; Street v. S., 43 Missis. 1; Ullery v. C., 8 B. Monr. 3; Shore v.

3. **Of Right or not.**—In these States, a prisoner is entitled as of right to bail in all cases not capital; in capital ones, bail is either a right, or permitted in the discretion of the court, whenever the proof is not evident or the presumption great.[15]

§ 262. 1. **After Indictment.**—The grand jury is a part of the court, and after it has found an indictment the judge should assume the proof to have been evident; so that, in a capital case, *prima facie* the indicted defendant is not entitled to bail.[16] Still, at least by the better authorities, the facts may be inquired into on an application for bail, and the action of the bailing officer will be governed by what thus appears.[17]

2. **A Mistrial,**—where the jury did not agree, and especially two such failures, will strongly move the court toward the granting of bail.[18]

S., 6 Misso. 640; Foley v. P., Breese, 31, 32; Ex parte Banks, 28 Ala. 89; Ex parte McAnally, 53 Ala. 495, 25 Am. R. 646; Ex parte Foster, 5 Tex. Ap. 625; Ex parte Voll, 41 Cal. 29; Ex parte Boyett, 19 Tex. 17; S. v. Williams (Ark. 1911), 133 S. W. 1017.

15. Ex parte Goans, 99 Mo. 193, 17 Am. St. 571, 12 S. W. 635; Ex parte McAnally, 53 Ala. 495, 25 Am. R. 646; Ex parte Wray, 30 Miss. 673; Ex parte Banks, 28 Ala. 89; Ex parte Fortenberry, 53 Missis. 428; Thompson v. S., 25 Tex. Sup. 395; McCoy v. S., 25 Tex. 33, 78 Am. D 520; Drury v. S., 25 Tex. 45; S. v. Summons, 19 Ohio, 139; P. v. Perry, 8 Abb. Pr., n. s., 27; Ex parte Colter, 35 Ind. 109; Ex parte Jones, 55 Ind. 176; Ex parte Cochran, 20 Tex. Ap. 242; Ex parte Dickson, 20 Tex. Ap. 332; Ex parte Terry, 20 Tex. Ap. 486; Ex parte Wilson, 20 Tex. Ap. 498; Ex parte Foster, 5 Tex. Ap. 625; Ex parte Acree, 63 Ala. 234; Ex parte Dykes, 83 Ala. 114, 3 So. 306. See also Ex parte Bryant, 34 Ala. 270; Moore v. S., 36 Missis. 137; Ex parte Nathan (Fla. 1908), 50 So. 38; Ex parte Westmoreland, 2 Okla. Cr. App. 512, 103 P. 370. The burden to show proof is evident or presumption great is on prosecution. S. v. Kauffman, 20 S. D. 620, 108 N. W. 246, see also S. v. Hartzell, 13 N. D. 356, 100 N. W. 745.

16. Ex parte Jones, 55 Ind. 176; Ex parte Vaughan, 44 Ala. 17; P. v. Tinder, 19 Cal. 539, 81 Am. D. 77; Ex parte White, 4 Eng. 222.

17. Street v. S., 43 Missis. 1; Ex parte Jones, supra; Lynch v. P., 38 Ill. 494. And see Ex parte Heffren, 27 Ind. 87.

18. In re Alexander, 59 Mo. 598, 21 Am. R. 393; P. v. Perry, 8 Abb. Pr., n. s., 27; P. v. Cole, 6 Par. Cr 695; S. v. Summons, 19 Ohio, 139; Ex parte Goans, 99 Mo. 193, 17 Am. St. 571, 12 S. W. 635. For other

3. **After Verdict,**—according to a California decision, this constitutional provision is not applicable.[19]

§ 263. *Other Questions*:—

1. **Second Application.**—After bail has been refused, the court may decline to look again into the question; but there is not a technical bar,[20] though in one case it was so regarded.[21]

2. **Pending.**—While the question is pending before one competent tribunal, another should not interfere.[22]

§ 263 a. 1. **Bail forfeited—(Rearrest).**—One who has forfeited his recognizance may, even after it is paid, be rearrested and tried for his crime, whether felony or misdemeanor.[23] But this being in the nature of an escape,—

2. **Insufficient Sureties—(Fraud).**—It does not follow that if sureties fairly tendered and taken prove worthless, the principal who is without blame can be rearrested. It seems in reason that he cannot,[24] and so it has been held.[25] But if the bail were given by him in fraud, the analogies of the law, in cases both civil and criminal, indicate that it may be treated as void and he may be rearrested.[26] Moreover, one who has given bonds before the committing mag-

consideration, see Ex parte Moore, 30 Ind. 197; Beall v. S., 39 Missis. 715; Ex parte Miller, 41 Tex. 213; S. v. Summons, supra; S. v. Davidson, 20 Mo. 212, 61 Am. D. 603; Newton v. Bailey, 36 Ga. 180.

19. Ex parte Voll, 41 Cal. 29. And see Ex parte Brown, 68 Cal. 176, 8 P. 329; Hampton v. S., 42 Ohio St. 401; Ex parte Heath, 227 Mo. 393, 126 S. W. 1031.

20. Ex parte Campbell, 20 Ala. 89; Ex parte Isbell, 11 Nev. 295. And see In re Williams, 82 Cal. 183, 23 P. 118.

21. P. v. Cunningham, 3 Par. Cr. 531.

22. Ex parte Kittrel, 20 Ark. 499.

23. Ex parte Milburn, 9 Pet. 704.

24. See and compare McQueen v. Heck, 1 Coldw. 212; Housin v. Barrow, 6 T. R. 218; Wilson v. Hamer, 8 Bing. 54, 1 Moore & S. 120, 1 Dowl. P. C. 248; Doyle v. Russell, 30 Barb. 300; Redman v. S., 28 Ind. 205.

25. Post, § 1386.

26. Bulson v. P., 31 Ill. 409; Bradley v. Gompertz, 1 Man. & R. 567; Sutcliffe v. Eldred, 2 Dowl. P. C. 184; Ward v. Levi, 2 D. & R. 421, 1 B. & C. 268; Wilson v. Hamer, supra; Puckford v. Maxwell, 6 T. R. 52; Bronson v. Noyes, 7 Wend. 188; C. v. Hastings, 9 Met. 259; U. S. v. Lee, 170 Fed. 613.

istrate to answer to an indictment may be arrested on a bench warrant after the indictment is found.[27] And however this may be,—

3. **If a Second Arrest**—is made before forfeiture, the sureties are discharged;[28] if afterward, they are not.[29] So,—

4. **Taking New Bail**—releases former bail; because in legal effect it transfers the principal from the friendly custody of the first sureties to the second.[30]

III. *The Forms of Bail.*

§ 264. 1. **Money**—deposited in security is not bail, and by the common law rules an officer has no authority to receive it.[31] But in some of our States this is permitted by statute.[32]

2. **Recognizance—Bond of Record.**—The common form of bail is a recognizance,[33] or in some of our States a bond of record,[34] which is essentially the same. A recognizance proper is not signed,[35] though what in some States is called

27. Smith v. Kitchens, 51 Ga. 158, 21 Am. R. 232. See Chappell v. S., 30 Tex. 613.

28. Smith v. Kitchens, supra; Medlin v. C., 11 Bush, 605; Peacock v. S., 44 Tex. 11. And see Henry v. C., 4 Bush, 427; C. v. Bronson, 14 B. Monr. 361.

29. S. v. Emily, 24 Iowa, 24.

30. S. v. Becker, 80 Wis. 313, 50 N. W. 178.

31. S. v. Lazarre, 12 La. Ann. 166; Eagan v. Stevens, 39 Hun, 311. Depositor may recover it though accused does not appear. S. v. White, 40 Wash. 560, 82 P. 907; S. v. Anderson, 119 Iowa, 711, 94 N. W. 208; Bruscoe v. Retreat, 25 Ohio Ct. R. 193.

32. Wash. v. S., 3 Coldw. 91; Dean v. C., 1 Bush, 20; Morrow v. S., 6 Kan. 222; P. v. Laidlaw, 102 N. Y. 588, 7 N. E. 910. Accused has no right to assign money deposited by another. Way v. Day, 187 Mass. 476, 73 N. E. 543; as in New York, Sutherland v. St. Lawrence Co., 101 A. D. 299, 91 N. Y. S. 962.

33. 1 Chit. Crim. Law, 90; Bishop Con., § 145; Shattuck v. P., 4 Scam. 477; S. v. Weatherwax, 12 Kan. 463; Pugh v. S., 2 Head, 227; Bengough v. Rossiter, 4 T. R. 505, 2 H. Bl. 418; Hicks v. S., 3 Pike, 313; Laturner v. S., 9 Tex. 451.

34. S. v. Emily, 24 Iowa, 24; S. v. Badon, 14 La. Ann. 783; S. v. Cravey, 12 La. Ann. 224; S. v. Ansley, 13 La. Ann. 298; S. v. Houston, 74 N. C. 549; P. v. Mellor, 2 Colo. 705; Shattuck v. P., 4 Scam. 477; Williams v. S., 25 Fla. 734, 6 So. 831.

35. 1 Chit. Crim. Law, 90; C. v. Mason, 3 A. K. Mar. 456; Madison v. C., 2 A. K. Mar. 131.

such is,[36] and a signature to any recognizance does not harm it.[37] Nor is a seal essential;[38] nor, being a record,[39] is it within the Statute of Frauds.[40]

§ 264 a. 1. **Follow Law.**—The recognizance or bond must be taken before an authorized officer, and otherwise fill the requirements of the statutes and unwritten law of the particular State, or ordinarily it will be void. They differ in some degree.[41] Still,—

36. Cunningham v. S., 14 Mo. 402; Shattuck v. P., 4 Scam. 477.

37. C. v. Emery, 2 Binn. 431, 434; S. v. Western Surety Co. (S. D. 1910), 128 N. W. 173.

38. S. v. Foot, 2 Mill, 123; Slaten v. P., 21 Ill. 28; Hall v. S., 9 Ala. 827.

39. Bishop Com., §§ 145, 146; McElwee v. P., 77 Ill. 493; Barkley v. S., Meigs, 93; Pugh v. S., 2 Head, 227; Welborn v. P., 76 Ill. 516; P. v. Van Eps, 4 Wend. 387.

40. Grinestaff v. S., 53 Ind. 238. Surety must be sworn and questioned as to his solvency in the case in which bond is given. S. v. Koslowesky, 228 Mo. 351, 128 S. W. 741.

41. **Alabama.** Tolleson v. S., 139 Ala. 159, 35 So. 997; Lloyd v. S., Minor, 34; Howie v. S., 1 Ala. 113; Badger v. S., 5 Ala. 21; Ellison v. S., 8 Ala. 273; Hall v. S., 9 Ala. 827; Hall v. S., 15 Ala. 431; Antonez v. S., 26 Ala. 81; Vasser v. S., 32 Ala. 586; Barnett v. S., 34 Ala. 260; Tollison v. S., 39 Ala. 103; Avery v. S., 52 Ala. 340; Raisler v. S., 55 Ala. 64; Williams v. S., 55 Ala. 71; Hammons v. S., 59 Ala. 164, 31 Am. R. 13; Kilgrow v. S., 76 Ala. 101; King v. S., 81 Ala. 92, 8 So. 159.

Arkansas. Baily v. S., 71 Ark. 498, 76 S. W. 55; Hicks v. S., 3 Pike, 313; S. v. Williams, 17 Ark. 371; Blevins v. S., 31 Ark. 53; Humphries v. S., 33 Ark. 713; Adler v. S., 35 Ark. 517, 37 Am. R. 48.

California. P. v. Bircham, 12 Cal. 50; P. v. Benniman, 37 Cal. 271; P. v. Eaton, 41 Cal. 657; Los Angeles v. Babcock, 45 Cal. 252; Ex parte Smallman, 54 Cal. 35; Ex parte Duncan, 54 Cal. 75; San Francisco v. Randall, 54 Cal. 408; Ex parte Wolff, 57 Cal. 94; P. v. January, 70 Cal. 34, 11 P. 326; Ex parte Curtis, 92 Cal. 188, 28 P. 223.

Colorado. Chase v. P., 2 Colo. 528; P. v. Mellor, 2 Colo. 705; Connor v. P., 4 Colo. 134.

Connecticut. S. v. Burrows, Kirby, 259; Treasurer v. Burr, 1 Root, 392; Kingsbury v. Clark, 1 Conn. 406; Waldo v. Spencer, 4 Conn. 71; Darling v. Hubbell, 9 Conn. 350.

Florida. Ex parte Harfourd, 16 Fla. 283; Benjamin v. S., 25 Fla. 675, 6 So. 433; Williams v. S., 25 Fla. 734, 6 So. 831; Sims v. S., 26 Fla. 97, 7 So. 374.

Georgia. Nicholson v. S., 2 Kelly, 363; Park v. S., 4 Ga. 329; Adams v. The Governor, 22 Ga. 417; Salter v. Smith, 55 Ga. 244; Buffington v. Smith, 58 Ga. 341; S. v. Capers, 61 Ga. 263; Foote v. Gordon, 87 Ga. 277, 13 S. E. 512.

Idaho. P. v. Sloper, 1 Idaho, 183.

Illinois. P. v. Slayton, Breese, 257; Shattuck v. P., 4 Scam. 477;

2. **Directory.**—There are statutory provisions in their nature merely directory,[42]—as, that there shall be two sure-

42. Stat. Crimes, § 255.

(41 Continued.)

McFarlan v. P., 13 Ill. 9; Solomon v. P., 15 Ill. 291; Besimer v. P., 15 Ill. 439; Vancie v. P., 16 Ill. 120; Lawrence v. P., 17 Ill. 172; Waugh v. P., 17 Ill. 561; Jack v. P., 19 Ill. 57; P. v. Watkins, 19 Ill. 117; Vipond v. Hurlburt, 22 Ill. 226; Vincent v. P., 25 Ill. 500; Johnston v. P., 31 Ill. 469; Combs v. P., 39 Ill. 183; P. v. O'Brien, 41 Ill. 303; Stokes v. P., 63 Ill. 489; Bloomington v. Heiland, 67 Ill. 278; P. v. Meacham, 74 Ill. 292; Mooney v. P., 81 Ill. 134; Peacock v. P., 83 Ill. 331; Gallagher v. P., 91 Ill. 590; Petty v. P., 118 Ill. 148, 8 N. E. 304; Wilson v. P., 10 Bradw. 357; Reese v. P., 11 Bradw. 346; Petty v. P., 19 Bradw. 317; Lewis v. P., 23 Ill. App. 28.

Indiana. McCarty v. S., 1 Blackf. 338; Andress v. S., 3 Blackf. 108; Lang v. S., 3 Blackf. 344; Wellman v. S., 5 Blackf. 343; Davis v. S., 5 Blackf. 374; Ross v. S., 6 Blackf. 315; Burton v. S., 6 Blackf. 339; Lorance v. S., 1 Ind. 359; S. v. Hamer, 2 Ind. 371; Trimble v. S., 3 Ind. 151; Holtzclaw v. S., 4 Ind. 597; Patterson v. S., 10 Ind. 296; Patterson v. S., 12 Ind. 86; Votaw v. S., 12 Ind. 497; Kiser v. S., 13 Ind. 80; Tucker v. S., 13 Ind. 332; McClure v. S., 29 Ind. 359; Adams v. S., 48 Ind. 212 (overruling Urton v. S., 37 Ind. 339); Griffin v. S., 48 Ind. 258; Harris v. S., 54 Ind. 2; Ex parte Sutherlin, 56 Ind. 595; S. v. Thompson, 62 Ind. 367; S. v. Douglass, 69 Ind. 544; Fowler v. S., 91 Ind. 507; S. v. Rowe, 103 Ind. 118, 2 N. E. 294; S. v. Soudriette, 105 Ind. 306, 4 N. E. 860; Carmody v. S., 105 Ind. 546, 5 N. E. 679.

Iowa. S. v. Carr, 4 Iowa, 289; S. v. Cannon, 34 Iowa, 322; S. v. Wells, 36 Iowa, 238; S. v. Wright, 37 Iowa, 522; Murphy v. McMillan, 59 Iowa, 515, 1 N. W. 691.

Kansas. Morrow v. S., 5 Kan. 563; Gay v. S., 7 Kan. 394; Ingram v. S., 10 Kan. 630; Jennings v. S., 13 Kan. 80; S. v. Kurtz, 27 Kan. 223; Tillson v. S., 29 Kan. 452; S. v. Terrell, 29 Kan. 563; Madden v. S., 35 Kan. 146, 10 P. 469; In re Malison, 36 Kan. 725, 14 P. 144.

Kentucky. Com. v. Phillips, 25 Ky. L. 544, 76 S. W. 118; Adams v. Ashby, 2 Bibb, 96; C. v. Littell, 1 A. K. Mar. 566; Fowler v. C., 4 T. B. Monr. 128; C. v. Lee, 3 J. J. Mar. 698; Frishe v. C., 6 Dana, 318; Ready v. C., 9 Dana, 38; Adams v. C., 1 B. Monr. 70; Hostetter v. C., 12 B. Monr. 1; C. v. Fisher, 2 Duv. 376; C. v. Ramsay, 2 Duv. 385; Dean v. C., 1 Bush, 20; Branham v. C., 2 Bush, 3; Rice v. C., 3 Bush, 14; Wallenweber v. C., 3 Bush, 68; Covington v. C., 3 Bush, 478; Creekmore v. C., 5 Bush, 312; C. v. Ball, 6 Bush, 291; Dugan v. C., 6 Bush, 305; C. v. O'Daniel, 9 Bush, 551; Morgan v. C., 12 Bush, 84.

Louisiana. S. v. Smith, 12 La. Ann. 349; S. v. McKeown, 12 La. Ann. 596; S. v. Ansley, 13 La. Ann. 298; Taliaferro v. Steele, 14 La. Ann. 656; S. v. Fuller, 14 La. Ann. 726; S. v. Whitaker, 19 La. Ann.

ties,[43] that they shall be residents of the State,[44] shall not be lawyers,[45] and the like,[46]—a non-compliance with which

43. S. v. Benton, 48 N. H. 551.

44. C. v. Ramsay, 2 Duv. 385. Ex parte Ruef, 8 Cal. Ap. 468, 97 P. 89.

45. Jack v. P., 19 Ill. 57.

46. Rainbolt v. S., 34 Tex. 286; Doughty v. S., 33 Tex. 1; Dyches v. S., 24 Tex. 266; S. v. Lagoni, 30 Mont. 472, 76 P. 1044.

(41 Continued.)

142; S. v. Gibson, 23 La. Ann. 698; S. v. Nicol, 30 La. Ann. 628; S. v. Tennant, 30 La. Ann. 852; S. v. Brusle, 34 La. Ann. 61.

Maine. S. v. Smith, 2 Greenl. 62; S. v. Berry, 8 Greenl. 179; S. v. Magrath, 31 Me. 469; S. v. Lane, 33 Me. 536; S. v. Suhur, 33 Me. 539; S. v. Hatch, 59 Me. 410; S. v. Crowley, 60 Me. 103; S. v. Cobb, 71 Me. 198; Pike v. Neal, 73 Me. 513; S. v. Howley, 73 Me. 552; Pooler v. Reed, 75 Me. 488.

Maryland. Coleman v. S., 10 Md. 168; Tucker v. S., 11 Md. 322; Parrish v. S., 14 Md. 238.

Massachusetts. C. v. Downey, 9 Mass. 520; C. v. Loveridge, 11 Mass. 337; C. v. Otis, 16 Mass. 198; C. v. Daggett, 16 Mass. 447; C. v. Canada, 13 Pick. 86; C. v. Harley, 7 Met. 467; C. v. Baird, 9 Met. 407; C. v. McLane, 4 Gray, 427; C. v. Nye, 7 Gray, 316; Underwood v. Clements, 16 Gray, 169; C. v. Greene, 13 Allen, 251; C. v. Sholes, 13 Allen, 396; C. v. Butland, 119 Mass. 317; Allen's Case, 126 Mass. 224; C. v. Parker, 140 Mass. 439, 5 N. E. 167.

Michigan. P. v. Dennis, 4 Mich. 609, 69 Am. D. 338; Daniels v. P., 6 Mich. 381.

Minnesota. S. v. Perry, 28 Minn. 455, 10 N. W. 778.

Mississippi. Dean v. S., 2 Sm. & M. 200; Butler v. S., 12 Sm. & M. 470; S. v. Brown, 32 Miss. 275; Moore v. S., 36 Miss. 137; Kellogg v. S., 43 Miss. 57; Ex parte Bell, 56 Miss. 282; Ex parte Bridewell, 57 Miss. 177; Hill v. S., 64 Miss. 431, 1 So. 494.

Missouri. Todd v. S., 1 Mo. 566; S. v. Randolph, 22 Mo. 474; S. v. Randolph, 26 Mo. 213; S. v. Cobb, 44 Mo. Ap. 375; S. v. Woodson, 179 Mo. 408, 78 S. W. 603.

Nebraska. Irwin v. S., 10 Neb. 325, 6 N. W. 370; Holmes v. S., 17 Neb. 73, 22 N. W. 232; King v. S., 18 Neb. 375, 25 N. W. 519; S. v. Moran, 18 Neb. 536, 26 N. W. 357.

Nevada. S. v. Birchim, 9 Nev. 95.

New Hampshire. S. v. Buffum, 2 Fost. N. H. 267; S. v. Fowler, 8 Fost. N. H. 184; S. v. Benton, 48 N. H. 551.

New York. P. v. Van Eps, 4 Wend. 387; P. v. Kane, 4 Denio, 530 (overruling, in part, P. v. Koeber, 7 Hill, N. Y. 39, and P. v. Young, 7 Hill, N. Y. 44); P. v. Main, 20 N. Y. 434; P. v. Clews, 77 N. Y. 39; P. v. Laidlaw, 102 N. Y. 588, 7 N. E. 910; Haberstro v. Bedford, 118 N. Y. 187, 23 N. E. 459; P. v. Gillman, 125 N. Y. 372, 26 N. E. 469; P. v. Leggett, 5 Barb. 360; Gildersleeve v. P., 10 Barb. 35; P. v. Felton, 36 Barb. 429; P. v. Oyer and Terminer,

does not impair the recognizance or bond if adequate in other respects. And it may be good at common law while as a statutory obligation void because departing from the statute.[47]

47. Reg. v. Ewer, Holt, 612; Phelps v. Parks, 4 Vt. 488; Nicholson v. S., 2 Kelly, 363; S. v. Cannon, 34 Iowa, 322; Contra City and County, etc. v. Harnett, 1 Cal. App. 652, 82 P. 1064; Ter. v. Woodring, 15 Okla. 203, L. R. A. (N. S.) 848, 82 P. 572; Ter. v. Reynolds, 15 Okla. 185, 82 P. 574.

(41 Continued.)

7 Hun, 114; P. v. Welch, 47 How. Pr. 420; P. v. Graham, 1 Par. Cr. 141; P. v. Mack, 1 Par. Cr. 567; P. v. Shaver, 4 Par. Cr. 45.

North Carolina. S. v. Mills, 2 Dev. 555; S. v. Edney, 4 Dev. & Bat. 378; S. v. Jones, 88 N. C. 683; S. v. Walker, 94 N. C. 857.

Ohio. S. v. Wellman, 3 Ohio, 14; S. v. Clark, 15 Ohio, 595; Sargeant v S., 16 Ohio, 267; S. v. Crippen, 1 Ohio St. 399; S. v. West, 3 Ohio St. 509; Millikin v. S., 21 Ohio St. 635; Proseck v. S., 38 Ohio St. 606.

Oregon. Williams v. Shelby, 2 Ore. 144; Malheur County v. Carter, 52 Ore. 616, 98 P. 489.

Pennsylvania. C. v. Emery, 2 Binn. 431; Bodine v. C., 24 Pa. 69; Hosie v. Gray, 73 Pa. 502; C. v. Myers, 137 Pa. 407, 21 A. 246; C. v. McHenry, 13 Phila. 451.

Rhode Island. S. v. McCarty, 4 R. I. 82; S. v. Edgerton, 12 R. I. 104.

South Carolina. S. v. Rowe, 8 Rich. 17; S. v. Ahrens, 12 Rich. 493; S. v. Wilder, 13 S. C. 344; S. v. Minton, 19 S. C. 280; S. v. Satterwhite, 20 S. C. 536; S. v. McFail, 35 S. C. 605, 14 S. E. 289.

Tennessee. S. v. Sullivant, 3 Yerg. 281; Grigsby v. S., 6 Yerg. 354; S. v. Rye, 9 Yerg. 386; S. v. Cherry, Meigs, 232; S. v. Austin, 4 Humph. 213; S. v. Edwards, 4 Humph. 226; Scott v. S., 1 Head, 433; Brewer v. S., 6 Lea, 198; Holcomb v. S., 6 Lea, 668.

Texas. Dailey v. S., 4 Tex. 417; Cotton v. S., 7 Tex. 547; Laturner v. S., 9 Tex. 451; Palvadore v. S., 12 Tex. 230; Williford v. S., 17 Tex. 653; Manes v. S., 20 Tex. 38; Hodges v. S., 20 Tex. 493; Gay v. S., 20 Tex. 504; Davidson v. S., 20 Tex. 649; Brite v. S., 24 Tex. 219; S. v. Russell, 24 Tex. 505; Wilcox v. S., 24 Tex. 544; Grier v. S., 29 Tex. 95; Ferrill v. S., 29 Tex. 489; S. v. Hotchkiss, 30 Tex. 162; Horton v. S., 30 Tex. 191; Payne v. S., 30 Tex. 397; Bennett v. S., 30 Tex. 446; Tierney v. S., 31 Tex. 40; Gonzales v. S., 31 Tex. 205; Davis v. S., 30 Tex. 352; Robinson v. S., 30 Tex. 437; Adler v. S., 31 Tex. 61; Breeding v. S., 31 Tex. 94; Thompson v. S., 31 Tex. 166; Goldthwaite v. S., 32 Tex. 599; Barrera v. S., 32 Tex. 644; Doughty v. S., 33 Tex. 1; S. v. Glavecke, 33 Tex. 53; Montgomery v. S., 33 Tex. 179; Stroud v. S., 33 Tex. 650; Moore v. S., 34 Tex. 138; S. v. Brown, 34 Tex. 146; Rainbolt v. S., 34 Tex. 286; Brown v. S., 34 Tex. 525; Patton v. S., 35 Tex. 92; Smith v. S., 36 Tex. 317; S. v.

§ 264 b. 1. **The Entire Undertaking**—must be expressed, or be otherwise derivable from the words.[48] For example,—

48. Grigsby v. S., 6 Yerg. 354; S. v. Crippen, 1 Ohio St. 399; C. v. Emery, 2 Binn. 431; Reg. v. Hodgson, Dears. 14, 7 Exch. 915, 14 Eng. L. & Eq. 456; Reg. v. Hawdon, 1 Q. B. 464, 1 Gale & D. 135; Rex v. Teal, 13 East, 4. Also the Court. Buzan v. S. (Tex. Cr. App.), 127 S. W. 1030.

(41 Continued.)

Rhodius, 37 Tex. 165; Gorman v. S., 38 Tex. 112, 19 Am. R. 29; Ishmael v. S., 41 Tex. 244; S. v. Becknall, 41 Tex. 319; S. v. Gordon, 41 Tex. 510; Turner v. S., 41 Tex. 549; Vanwey v. S., 44 Tex. 112; Sively v. S., 44 Tex. 274; Hart v. S., 2 Tex. Ap. 39; Smalley v. S., 3 Tex. Ap. 202 (overruling McCoy v. S., 37 Tex. 219); Teel v. S., 3 Tex. Ap. 326; Blalack v. S., 3 Tex. Ap. 376; Arnold v. S., 3 Tex. Ap. 437; Munch v. S., 3 Tex. Ap. 552; Foard v. S., 3 Tex. Ap. 556; McLaren v. S., 3 Tex. Ap. 680; Cassaday v. S., 4 Tex. Ap. 96; Hutchison v. S., 4 Tex. Ap. 435; Morris v. S., 4 Tex. Ap. 554; Morris v. S., 4 Tex. Ap. 557; Massey v. S., 4 Tex. Ap. 580; Wills v. S., 4 Tex. Ap. 613; Brown v. S., 6 Tex. Ap. 188; Neblett v. S., 6 Tex. Ap. 316; Warnock v. S., 6 Tex. Ap. 450; Stancel v. S., 6 Tex. Ap. 460; Carroll v. S., 6 Tex. Ap. 463; Ex parte Scoggin, 6 Tex. Ap. 546; Killingsworth v. S., 7 Tex. Ap. 28; Wilson v. S., 7 Tex. Ap. 38; Riviere v. S., 7 Tex. Ap. 55; Townsend v. S., 7 Tex. Ap. 74; Magee v. S., 7 Tex. Ap. 99; Smith v. S., 7 Tex. Ap. 160; Pearson v. S., 7 Tex. Ap. 279; Ex parte Erwin, 7 Tex. Ap. 288; Crowder v. S., 7 Tex. Ap. 484; Jones v. S., 8 Tex. Ap. 365; Cargill v. S., 8 Tex. Ap. 431; Grant v. S., 8 Tex. Ap. 432; Smith v. S., 9 Tex. Ap. 315; Patillo v. S., 9 Tex. Ap. 456; O'Bannon v. S., 9 Tex. Ap. 465; Loving v. S., 9 Tex. Ap. 471; Viser v. S., 10 Tex. Ap. 86; McAdams v. S., 10 Tex. Ap. 317; Roberts v. S., 11 Tex. Ap. 26; Gary v. S., 11 Tex. Ap. 527; Williamson v. S., 12 Tex. Ap. 169; Price v. S., 12 Tex. Ap. 235; Weaver v. S., 13 Tex. Ap. 191; Kiser v. S., 13 Tex. Ap. 201; Thomas v. S., 13 Tex. Ap. 496; Fulton v. S., 14 Tex. Ap. 32; Turner v. S., 14 Tex. Ap. 168; Keppler v. S., 14 Tex. Ap. 173; Addison v. S., 14 Tex. Ap. 568; Mathena v. S., 15 Tex. Ap. 460; Hill v. S., 15 Tex. Ap. 530; Short v. S., 16 Tex. Ap. 44; Fentress v. S., 16 Tex. Ap. 79; Vivian v. S., 16 Tex. Ap. 262; Martin v. S., 16 Tex. Ap. 265; Ray v. S., 16 Tex. Ap. 268; Pickett v. S., 16 Tex. Ap. 648; Murphy v. S., 17 Tex. Ap. 100; Burnett v. S., 18 Tex. Ap. 283; Brown v. S., 18 Tex. Ap. 326; Wallen v. S., 18 Tex. Ap. 414; Ex parte Wood, 19 Tex. Ap. 46; McIntyre v. S., 19 Tex. Ap. 443; Holt v. S., 20 Tex. Ap. 271; Ex parte Wilson, 20 Tex. Ap. 498; Bowen v. S., 28 Tex. Ap. 103, 2 S. W. 413; Wegner v. S., 28 Tex. Ap. 419, 13 S. W. 608; Cresap v. S., 28 Tex. Ap. 529, 13 S. W. 992; Allee v. S., 28 Tex. Ap. 531, 13 S. W. 991.

Vermont. Treasurer v. Pierce, 2 D. Chip. 106; Treasurer v. Cook, 6 Vt. 282; Treasurer v. Woodward, 7

2. **The Time and Place**—for the appearance must be manifest;[49] and if the day named is one on which by law there is no court, the recognizance will be void.[50] Again,—

3. **Court Day changed.**—Though the recognizance rightly specifies the day of the court, if then a statute changes the latter, rendering performance impossible,[51] the undertaking becomes practically void. It would remain good if the legislative act directed appearance on the new day.[52] So that where the stipulation is to appear at the next term of the court, then the day for holding it is changed, the cognizors must conform to the altered law.[53] After breach, such new legislation is without effect.[54]

4. **Description of Offence.**—On this subject, said a learned judge, "it is impossible to reconcile the American cases."[55] Besides, the cases in their natures differ. Plainly there may be circumstances wherein the recognizance should be to answer to whatever may be alleged against the party.[56] It would then be idle to require a specifica-

Vt. 529; Chittenden v. Mitchell, 23 Vt. 131; Treasurer v. Brooks, 23 Vt. 698; S. v. Lamoine, 53 Vt. 568.

Virginia. Hamlett v. C., 3 Grat. 82; Saunders v. C., 3 Grat. 214; Archer v. C., 10 Grat. 627; Gedney v. C., 14 Grat. 318.

Washington. Ainsworth v. Territory, 3 Wash. Ter. 270, 14 P. 590.

Wisconsin. S. v. Wettstein, 64 Wis. 234, 25 N. W. 34; S. v. Becker, 80 Wis. 313, 50 N. W. 178.

United States. Dillingham v. U. S., 2 Wash. C. C. 422; U. S. v. Dennis, 1 Bond, 103; U. S. v. Goldstein, 1 Dill. 413; U. S. v. Horton, 2 Dil. 94; U. S. v. George, 3 Dil. 431; U. S. v. Evans, 2 Flip. 605; U. S. v. Simmons, 47 Fed. 575.

49. S. v. Allen, 33 Ala. 422; P. v. Carpenter, 7 Cal. 402; Wheeler v. S., 21 Ga. 153; Mooney v. P., 81 Ill. 134; Brite v. S., 24 Tex. 219; S. v. Bradley, 1 Blackf. 83; Henry v. C., 4 Bush. 427; Sheets v. P., 63 Ill. 78; Sloan v. S., 39 Tex. Cr. Ap. 63, 44 S. W. 1095.

50. S. v. Sullivant, 3 Yerg. 281; Butler v. S., 12 Sm. & M. 470; Thurston v. C., 3 Dana, 225; Burnett v. S., 18 Tex. Ap. 283; Thomas v. S., 13 Tex. Ap. 496.

51. Bishop Con., § 594.

52. S. v. Melton, Busbee, 426; S. v. Stephens, 2 Swan (Tenn.), 308. See Price v. White, 27 Mo. 275; C. v. Cayton, 2 Dana, 138; C. v. Parker, 140 Mass. 439, 5 N. E. 167; Pike v. Neal, 73 Me. 513.

53. Walker v. S., 6 Ala. 350. Compare with Williamson v. S., 12 Tex. Ap. 169; S. v. Jenkins, 121 N. C. 637, 28 S. E. 413.

54. S. v. Boies, 41 Me. 344.

55. Leonard, J., in S. v. Randolph, 22 Mo. 474, 479.

56. Reg. v. Ridpath, 10 Mod. 152. Under the New York Code, see

tion of the offence,[57] or accuracy therein.[58] It is, at least, justifiable to extend the recognizance over all the wrong the statute specifies.[59] Yet, in general, it need only cover some wrongful act, not the wickedness of a lifetime. Hence, in some form it must commonly indicate what the offence is;[60] though it need not descend to particulars, like an indictment.[61] To employ general words suffices; as, "stealing from a store,"[62] "resisting process,"[63] "assault to murder."[64] But words falling short of a complete indictable wrong will not suffice, though mere generality in their meaning is not objectionable.[65] The wrong must be within

P. v. Gillman, 125 N. Y. 372, 26 N. E. 469.

57. S. v. Randolph, supra; S. v. Rye, 9 Yerg. 386.

58. S. v. Loeb, 21 La. Ann. 599; S. v. Ansley, 13 La. Ann. 298; S. v. Bertrand, 122 La. 856, 48 So. 302.

59. Sturges v. Sherwood, 15 Conn. 149.

60. Goodwin v. The Governor, 1 Stew. & P. 465; Simpson v. C., 1 Dana, 523; Sturges v. Sherwood, 15 Conn. 149; Dillingham v. U. S., 2 Wash. C. C. 422; Malheur County v. Carter, 52 Oreg. 616, 98 P. 489; White v. S. (Tex. Cr. App. 1903), 74 S. W. 770; Lindsey v. S. (Tex. Cr. Ap. 1910), 128 S. W. 386; Woods v. S., 51 Tex. Cr. 595, 103 S. W. 895.

61. U. S. v. Dennis, 1 Bond, 103; S. v. Weaver, 18 Ala. 293; Besimer v. P., 15 Ill. 439; S. v. Merrihhew, 47 Iowa, 112, 29 Am. R. 464; S. v. Tennant, 30 La. Ann. 852; S. v. Howley, 73 Me. 552; U. S. v. Dunbar, 27 C. C. A. 488, 83 Fed. 151; S. v. O'Keefe, 32 Nev. 33, 108 P. 2; Jones v. S., 38 Tex. Cr. App. 364, 43 S. W. 78; Harris v. S., 58 Tex. Cr. App. 523, 126 S. W. 890; Allen v. Com., 24 Ky. L. 2257, 73 S. W. 1027; P. v. Torn, 110 App. Div. 676, 97 N. Y. S. 523; P. v. Russell, 35 Misc. 765, 67 A. D. 620, 74 N. Y. S. 1141, 171 N. Y. 655, 63 N. E. 1120; Ter. v. Minter, 14 N. M. 6, 88 P. 1130; Ter. v. Conner, 17 Okla. 135, 87 P. 591; Wells v. Terrell, 121 Ga. 368, 49 S. E. 319.

62. Young v. P., 18 Ill. 566. And see P. v. Baughman, 18 Ill. 152; Hampton v. Brown, 32 Ga. 251; Chase v. P., 2 Colo. 528; Wood v. P., 16 Ill. 171; Fowler v. C., 4 T. B. Monr. 128; P. v. Dennis, 4 Mich. 609, 69 Am. D. 338; Daniels v. P., 6 Mich. 381; Hutchison v. S., 4 Tex. Ap. 435; Vivian v. S., 16 Tex. Ap. 262; Foote v. Gordon, 87 Ga. 277, 13 S. E. 512.

63. Browder v. S., 9 Ala. 58. And see S. v. Eldred, 31 Ala. 393.

64. Wills v. S., 4 Tex. Ap. 613.

65. Badger v. S., 5 Ala. 21; S. v. Gibson, 23 La. Ann. 698; Cresap v. S., 28 Tex. Ap. 529, 13 S. W. 992; Bowen v. S., 28 Tex. Ap. 103, 12 S. W. 413; Keppler v. S., 14 Tex. Ap. 173; O'Bannon v. S., 9 Tex. Ap. 465; Magee v. S., 7 Tex. Ap. 99; Riviere v. S., 7 Tex. Ap. 55; Killingsworth v. S., 7 Tex. Ap. 28; Stancel v. S., 6

the cognizance of the magistrate.[66]

§ 264 c. 1. **Principal bound or not.**—One may validly recognize for the appearance of another who is not bound.[67] Hence,—

2. **A Married Woman,**—with no separate estate, being incompetent at the common law to bind herself even for necessaries,[68] cannot under such law enter into a valid recognizance.[69] Therefore, before our statutes were enacted giving her substantially the powers of a *feme sole,* the course was to take the recognizance "only from the sureties."[70] Probably, in a part of our States, this practice has been changed in consequence of the new statutes. But—

3. **An Infant**—may be bound by contract for necessaries;[71] and though not every sort of recognizance will be valid against him,[72] one for so necessary a thing as to procure his personal liberty should be, and, at least by the better doctrine, it is.[73] So that to join him with his sureties is highly proper.

Tex. Ap. 460; Morris v. S., 4 Tex. Ap. 554; McLaren v. S., 3 Tex. Ap. 680; Foard v. S., 3 Tex. Ap. 556; McAdams v. S., 10 Tex. App. 317. A statute providing bond is sufficient if it state defendant is charged with a felony or misdemeanor, permits but does not require these words to be used. U. S. v. Zarafonitis, 80 C. C. A. 51, 150 Fed. 97.

66. S. v. Forno, 14 La. Ann. 450. And see Billings v. Avery, 7 Conn. 236. By some statutes bond must state whether offense is felony or misdemeanor. Nichols v. S., 47 Tex. Cr. Ap. 406, 83 S. W. 1113; Hart v. S., 47 Tex. Cr. App. 502, 84 S. W. 59. As to variance in describing crime. S. v. Mudd (Mo. 1911), 134 S. W. 562.

67. Minor v. S., 1 Blackf. 236; P. v. Dennis, 4 Mich. 609, 69 Am. D. 338; Smith v. Villars, 1 Salk. 3. See Combs v. P., 39 Ill. 183; Pickett v. S., 16 Tex. Ap. 648; S. v. Peyton, 32 Mo. App. 522; Com. v. Lamar, 32 Pa. Super. Ct. 200; S. v. Cornell, 70 S. C. 409, 50 S. E. 22; S. v. Quattlebaum, 67 S. C. 203, 45 S. E. 162; Tillson v. S., 29 Kan. 452.

68. 1 Bishop Mar. Women, §§ 39, 842.

69. Bennet v. Watson, 3 M. & S. 1.

70. 1 Chit. Crim. Law, 104; Anonymous, 7 Mod. 63; C. v. Semmes, 11 Leigh, 665.

71. Bishop Con., §§ 908, 909.

72. Randal v. Wale, Cro. Jac. 59; Patchin v. Cromach, 13 Vt. 330.

73. S. v. Weatherwax, 12 Kan. 463; Weatherwax v. S., 17 Kan. 427; McCall v. Parker, 13 Met. 372, 46 Am. D. 735; Ex parte Williams, McClel. 493, 13 Price, 673. See Starr v. C., 7 Dana, 243.

is broken, and it is to be sued, it is estreated—that is, "extracted or taken out from among the other records"[86]—into the Exchequer therefor; but, though we estreat recognizances in the sense of separating them from the other records to be sued,[87] the removing of them to another court is, while known with us,[88] less practised.[89]

IV. *Charging, Discharging, and otherwise varying the Liabilities of the Sureties.*

§ 264 f. 1. Called.—Though one does not in due time respond to his recognizance, it is not forfeited until he is called in court, fails to appear, and the failure is entered of record.[90] But—

2. **When the Appearance Time has gone by,**—according to very many authorities, it is too late to hold the sureties.[91]

son, 28 Ark. 346; Conner v. P., 20 Ill. 381; Noble v. P., 4 Gilman, 433; Slaten v. P., 21 Ill. 28; C. v. Dunbar, 15 Gray, 209; C. v. Baird, 9 Met. 407; S. v. Walker, 56 N. H. 176.

86. 4 Bl. Com. 253; Rex v. Shackell, McClel. & Y. 514, 523; Ex parte Hodgson, 2 Y. & J. 142; Rex v. Tomb, 10 Mod. 278.

87. U. S. v. Santos, 5 Blatch. 104; Starr v. C., 7 Dana, 243; P. v. Winchell, 7 Cow. 160; S. v. Wilder, 13 S. C. 344; S. v. Minton, 19 S. C. 280.

88. C. v. McNeill, supra. See S. v. Kinne, 39 N. H. 129; Blackwell v. S., 3 Pike, 320. See, U. S. v. Kirk, 27 S. Ct. 788, 204 U. S. 668, 51 L. Ed. 671.

89. And see P. v. Hainer, 1 Denio, 454; P. v. Van Eps, 4 Wend. 387; P. v. Petry, 2 Hilton, 523.

90. Eubank v. P., 50 Ill. 496; Banta v. P., 53 Ill. 434; Park v. S., 4 Ga. 329; S. v. Grigsby, 3 Yerg. 280; White v. S., 5 Yerg. 183; Dillingham v. U. S., 2 Wash. C. C. 422; Alley v. P., 1 Gilman, 109; Kennedy v. P., 15 Ill. 418; Thomas v. P., 13 Ill. 696; P. v. Witt, 19 Ill. 169; P. v. Petry, 2 Hilton, 523; Chambless v. S., 20 Tex. 197; Schultze v. S., 43 Md. 295; S. v. Gorley, 2 Iowa, 52; Cable v. P., 46 Ill. 467; Mishler v. C., 62 Pa. 55, 1 Am. R. 377; Brown v. P., 24 Ill. Ap. 72; S. v. Thistlethwaite, 83 Ind. 317; Walker v. C., 79 Ky. 292; McGuire v. S., 124 Ind. 536, 539, 23 N. E. 85, 25 N. E. 11. See as explanatory, and more or less to the contrary. Wallenweber v. C., 3 Bush, 68; S. v. Walker, 56 N. H. 176; Adair v. S., 1 Blackf. 200; Leeper v. C., Litt. Sel. Cas. 102; Ingram v. S., 10 Kan. 630; P. v. Race, 2 Bradw. 563; S. v. White, 47 Iowa, 555; U. S. v. Dunbar, 27 C. C. A. 488, 83 Fed. 151; S. v. Wrote, 19 Mont. 209, 47 P. 898; Harbolt v. S., 39 Tex. Cr. Ap. 129, 44 S. W. 1110; P. v. Tidmarsh, 113 Ill. App. 153; S. v. Carnell, 70 S. C. 409, 50 S. E. 22; S. v. Dorr, 59 W. Va. 188, 53 S. E. 120.

91. P. v. Derby, 1 Par. Cr. 392; S. v. Houston, 74 N. C. 174; Kiser

§ 264 g. **Respite.**—A forfeited recognizance need not be put instantly in suit, nor need the suit be prosecuted without pause; so that, if one on bail does not duly appear, it is competent simply to take the forfeiture of his recognizance, and then respite it—that is, delay the estreat, or delay a suit already commenced on it—to another time or term; and on the defendant appearing reverse the order of forfeiture.[95] This plan is sometimes adopted to avoid the trouble of receiving bail which would otherwise expire.[96] But such a step should be taken either with the consent of bail, or in a manner not prejudicially to vary their undertaking, else they will be discharged.[97] Hence,—

§ 264 h. 1. **Setting aside Forfeiture.**—A ground for the reversal of a forfeiture is the subsequent appearance of the party and taking his trial. There are in some of our States statutes authorizing this on the payment of costs.[98] but the mere appearance, or submitting to a trial, does not have the effect without an order of court.[99] Also,—

2. **Mitigating.**—In England, when we derived thence our unwritten law, the Court of Exchequer, wherein these recognizances were sued, could in proper cases remit or re-

N. W. 908; Jones v. S., 11 Tex. Ap. 412; McGee v. S., 11 Tex. Ap. 520; S. v. Benzion, 79 Iowa, 467, 44 N. W. 709.

95. Newdigate's Case, 7 Mod. 17; Anonymous, 7 Mod. 97; Reg. v. Drummond, 11 Mod. 200; Rex v. Tomb, 10 Mod. 278; In re Fridlington, 9 Price, 658; P. v. Hainer, 1 Denio, 454, 456; P. v. Clary, 17 Wend. 374; C. v. Craig, 6 Rand. 731; U. S. v. Feely, 1 Brock. 255; Woodall v. Smith, 51 Ga. 171; Fleming v. Shockley, 8 Ga. Ap. 229, 68 S. E. 1013.

96. Keefhaver v. C., 2 Pa. (P. & W.) 240. See S. v. Smith, 66 N. C. 620; Reg. v. Tracy, 6 Mod. 178.

97. Reese v. U. S., 9 Wal. 13. See Swank v. S., 3 Ohio St. 429.

98. S. v. Brown, 13 La. Ann. 266; S. v. Schmidt, 13 La. Ann. 267; C. v. Davidson, 1 Bush. 133; Riggen v. C., 3 Bush, 493; S. v. Rollins, 52 Ind. 168; Miller v. S., 8 Blackf. 77; Wray v. P., 70 Ill. 664; S. v. Warren, 17 Tex. 283; C. v. Craig, 6 Rand. 731; Smith v. S., 17 Ga. 462; S. v. Saunders, 3 Halst. 177; and see U. S. v. Stien, 13 Blatch. 127; S. v. Taylor, 136 Mo. 462, 37 S. W. 1121; Bonner v. Com., 27 Ky. L. 652, 85 S. W. 1196; S. v. Edens (S. C. 1911), 70 S. E. 609.

99. Guice v. Stubbs, 13 La. Ann. 442; S. v. Schmidt, 13 La. Ann. 267; C. v. Johnson, 3 Cush. 454; Chambless v. S., 20 Tex. 197.

duce the forfeiture, though there was no reversal of the estreat.[1] Not inquiring whether this practice is common law with us, we have statutes and constitutional provisions under which the same thing is done by our courts.[2] Bail, asking relief, must not themselves be in fault.[3]

§ 264 i. 1. Impossibilities excusing.—A recognizance is a contract, and the effect of an impossibility upon a contract is explained in another word.[4] A change in the law rendering performance by the principal impossible,[5] or his death before forfeiture[6] or afterward before final judgment on the *scire facias,* in those States in which the right of surrender during this interval exists,[7] but not later,[8] or the inability produced by sickness[9] to the degree which in law is deemed an impossibility from the act of God,[10] will discharge the bail. There are minute differences in the authorities on some of these questions, but this contract is like any other wherein the act of the law or of God or of the public enemy excuses, yet no inferior difficulties will.[11] Hence,—

1. Bishop Con., §§ 147, 1457, 1458; Rex v. Tomb, 10 Mod. 278; 2 Burn Just. (28th Ed., p. 839); In re Hooper, McClel. 578.

2. Chase v. P., 2 Colo. 481; S. v. Shideler, 51 Ind. 64; S. v. Moody, 74 N. C. 73; Chambless v. S., 20 Tex. 197; Potter v. Sturdivant, 4 Greenl. 154; C. v. Thornton, 1 Met. (Ky.) 380; C. v. Coleman, 2 Met. Ky. 382; Harris v. C., 35 Pa. 416; C. v. Dana, 14 Mass. 65; S. v. Burnham, 44 Me. 278; Harbin v. S., 78 Iowa, 263; Foulke v. C., 90 Pa. 257; S. v. Kraner, 50 Iowa, 575, 582. See Steelman v. Mattix, 9 Vroom, 247, 20 Am. R. 389; Doniphan v. S., 50 Miss. 54; Stevens v. Hay, 61 Ill. 399; P. v. Coman, 49 How. Pr. 91; In re Sayles, 82 N. Y. S. 671.

3. S. v. McAllister, 54 N. H. 156; P. v. Petry, 2 Hilton, 523.

4. Bishop Con., §§ 577-609.

5. Ante, § 264b (3); Ringeman v. S., 136 Ala. 131, 34 So. 351.

6. Merritt v. Thompson, 1 Hilton, 550.

7. Mather v. P., 12 Ill. 9; Woolfolk v. S., 10 Ind. 532; S. v. Cone, 32 Ga. 663.

8. S. v. McNeal, 3 Harrison, 333.

9. P. v. Tubbs, 37 N. Y. 586. But see S. v. Edwards, 4 Humph. 226; Alguire v. C., 3 B. Monr. 349; Bonner v. Com., 27 Ky. L. R. 652, 85 S. W. 1196.

10. Bishop Con., §§ 592, 593, 596, 597, 604; Piercy v. P., 10 Bradw. 219; Adler v. S., 35 Ark. 517, 37 Am. R. 48; Bonner v. Com., 27 Ky. L. R. 652, 85 S. W. 1196.

11. P. v. Tubbs, supra; P. v. Bartlett, 3 Hill (N. Y.), 570; Caldwell v. C., 14 Grat. 698, 702; Weddington v. C., 79 Ky. 582; Fleenor v. S., 58 Ind. 166.

2. **Imprisonment,**—which is the act of the law, will generally excuse the bail for the non-production of their principal, the State having taken him out of their possession;[12] and so will the surrendering of him to the authorities of another State as a fugitive from justice.[13] But if bail permit him to go into another jurisdiction, and he is imprisoned there, they will not be released; for they should have kept him within his State.[14] It was the fault of the bail that the foreign law was given the opportunity to interpose. So that as the United States has a local jurisdiction and may make an arrest on State territory, bail will be discharged if the principal was put and kept in prison by the national power.[15] In just doctrine, and for reasons stated elsewhere,[15a] his confinement on civil process, wherein, as on criminal, the State takes possession of him, will have the same effect on the liability of bail as a confinement for crime.

3. **Other Grounds of Release,**—growing out of the fact that the recognizance is a contract, depend, like the foregoing, on the general law of contracts. Thus, if without the consent of the sureties the recognizance has been materially altered, they will be discharged.[16] In like manner,

12. Lacy's Case, Sir F. Moore, 121; Way v. Wright, 5 Met. 380; Kirby v. C., 1 Bush, 113; Caldwell v. C., supra; P. v. Bartlett, supra; Canby v. Griffin, 3 Harring. (Del.) 333; S. v. Orsler, 48 Iowa, 343; Buffington v. Smith, 58 Ga. 341. See Wheeler v. S., 38 Tex. 173; Brown v. P., 26 Ill. 28; Mix v. P., 26 Ill. 32; Miller v. S., 158 Ala. 73, 48 So. 360; S. v. Funk (N. D. 1910), 127 N. W. 722; In re Beavers, 131 Fed. 366.

13. S. v. Allen, 2 Humph. 258; Devine v. S., 5 Sneed, 623, 626.

14. Devine v. S., supra; S. v. Burnham, 44 Me. 278; Taintor v. Taylor, 36 Conn. 242, 252, 4 Am. R. 58; Taylor v. Taintor, 16 Wal. 366; U. S. v. Van Fossen, 1 Dil. 406; Adler v. S., 35 Ark. 517, 37 Am. R. 48; S. v. Merrihew, 47 Iowa, 112, 29 Am. R. 464; King v. S., 18 Neb. 375, 25 N. W. 519; Yarbrough v. C., 89 Ky. 151, 25 Am. St. 524, 12 S. W. 143; S. v. Horn, 70 Mo. 466, 35 Am. R. 437; C. v. House, 13 Bush, 679; Cain v. S., 55 Ala. 170; Cooper v. S., 5 Tex. Ap. 215, 32 Am. R. 571; Smith v. S., 12 Neb. 309, 11 N. W. 317. And see S. v. Reaney, 13 Md. 230; U. S. v. Martin, 170 Fed. 476; S. v. Boasberg, 124 La. 289, 50 So. 162.

15. C. v. Overby, 80 Ky. 208, 44 Am. R. 471; C. v. House, 13 Bush, 679.

15a. Bishop Con., § 607.

16. Davis v. S., 5 Tex. Ap. 48. Change of venue releases sureties

stantial, not a mere technical, identity in the offences.[24]

§ 264 k. **An Ill Indictment**—does not necessarily have the effect to discharge sureties.[25] They cannot, when sued, question the sufficiency of the indictment.[26] A motion to quash it, or other proceeding having the like effect, must, as we shall see in the next chapter, be in the presence of the defendant, and we have seen[27] that the court may hold him till he recognizes to a fresh charge; or, if by the recognizance he is not to depart without leave of court, it will bind him until permission to depart is given.[28]

§ 264 l. **Discharging or quashing Recognizance.**—There have been some questions as to quashing[29] and discharging[30] the recognizance. A discharge does not terminate the prosecution.[31]

§ 264 m. **Suit on Recognizance.**—It is the duty of the prosecuting officer to collect the forfeitures.[32] He cannot compromise the indebtedness.[33] If not paid voluntarily, they must be sued.[34] The ordinary common law action is *scire facias*,[35] but debt also will lie.[36] In some of our States,

24. Gresham v. S., 48 Ala. 625; S. v. Bean, 36 N. H. 122.

25. C. v. Skeggs, 3 Bush, 19, Rubush v. S., 112 Ind. 107. And see S. v. Bryant, 55 Iowa, 451; S. v. Spear, 54 Vt. 503. Or the fact that the prosecution was barred by lapse of time. U. S. v. Dunbar, 27 C. C. A. 488, 83 Fed. 151; Bird v. Terrell, 128 Ga. 386, 57 S. E. 777.

26. S. v. Ake, 41 Tex. 166; Williams v. S., 20 Ala. 63; S. v. Weaver, 18 Ala. 293; Hester v. S., 15 Tex. Ap. 418; Jones v. S., 15 Tex. Ap. 82; U. S. v. Moutheis, Bondsmen, 2 Alaska 459.

27. Ante, § 229 (2).

28. S. v. Poston, 63 Mo. 521. And see on the subject of this section, S. v. Boies, 41 Me. 344; P. v. Dennis, 4 Mich. 609, 69 Am. D. 338; S. v. Lockhart, 24 Ga. 420; S. v. Millsaps, 69 Mo. 359.

29. S. v. Halloway, 5 Pike, 433; S. v. Hopkins, 30 Mo. 404.

30. Rex v. England, Cas. temp. Hardw. 158; Rex v. Benn, Cas. temp. Hardw. 98.

31. S. v. Howard, 15 Rich. 274.

32. P. v. Van Eps, 4 Wend. 387; S. v. Gorley, 2 Iowa, 52.

33. Whittington v. Ross, 8 Bradw. 234.

34. Johnstons v. S., 3 Pike, 524; Pinckard v. P., 1 Scam. 187; P. v. Bugbee, 1 Idaho, 96; P. v. Myers. 1 Sheldon, 429.

35. Rex v. More, T. Raym. 196; Gilmer v. Blackwell, Dudley, Ga. 6; Marr v. S., 26 Ark. 410. A civil action and a dismissal do not invalidate the bond or relieve the sureties. Perkins v. Terrill, 1 Ga. Ap. 250, 58 S. E. 133. See, also, S. v. Edminster, 105 Me. 485, 75 A. 57; S. v. Baughman (Mo. Ap. 1903), 74

there are also statutory remedies, which may or not, according to the terms of the statute, supersede those of the common law.[37] Some cases relating to the suit are cited in a note.[38]

S. W. 433; Hollister v. U. S., 76 C. C. A. 337, 145 Fed. 773.

36. C. v. Green, 12 Mass. 1; C. v. Gordon, 15 Pick. 193; P. v. Van Eps, 4 Wend. 387; S. v. Walker, 56 N. H. 176. Proceeds in Federal Court belong to United States and cannot be applied as costs to adverse party. U. S. v. Alexandroff, 148 Fed. 652.

37. Schultze v. S., 43 Md. 295; S. v. Newton, 22 Wis. 536; Gamble v. S., 21 Ohio St. 183; Young v. Wise, 45 Ga. 81; S. v. Boies, 41 Me. 344; Baker v. U. S., 1 Minn. 207; Gildersleeve v. P., 10 Barb. 35.

38. **Alabama.** S. v. Hinson, 4 Ala. 671; Badger v. S., 5 Ala. 21; Williams v. S., 11 Ala. 676; Hall v. S., 15 Ala. 431; S. v. Weaver, 18 Ala. 284; Richardson v. S., 31 Ala. 347; Cantaline v. S., 33 Ala. 439; Hatch v. S., 40 Ala. 718; Gresham v. S., 48 Ala. 625; S. v. Posey, 79 Ala. 45.

Arkansas. Cauthron v. S., 43 Ark. 128; Littleton v. S., 46 Ark. 413.

Connecticut. Waldo v. Spencer, 4 Conn. 71.

Illinois. Norfolk v. P., 43 Ill. 9; Rietzell v. P., 72 Ill. 416; Peacock v. P., 83 Ill. 331; Compton v. P., 86 Ill. 176; Sheffield v. O'Day, 7 Bradw. 339.

Indiana. Lyons v. S., 1 Blackf. 309; Andress v. S., 3 Blackf. 108; Crandall v. S., 6 Blackf. 284; Gachenheimer v. S., 28 Ind. 91; Glass v. S., 39 Ind. 205; Friedline v. S., 93 Ind. 366.

Iowa. S. v. Foster, 2 Iowa, 559; S. v. Hirronemus, 50 Iowa, 545.

Kansas. S. v. Smith, 83 Kan. 240, 111 P. 184.

Kentucky. Leeper v. C., Litt. Sel. Cas. 102; Downing v. C., 4 T. B. Monr. 511; C. v. Kimberlain, 6 T. B. Monr. 43; C. v. Miller, 4 Monr. 418.

Louisiana. S. v. Williams, 37 La. Ann. 200; S. v. O'Rourke, 49 La. Ann. 1567, 22 So. 818.

Maine. S. v. Chandler, 79 Me. 172, 8a. 553.

Massachusetts. C. v. Gordon, 15 Pick. 193; C. v. Thompson, 2 Gray, 82; C. v. Brown, 7 Gray, 319.

Mississippi. Ditto v. S., 30 Miss. 126; Tucker v. S., 55 Miss. 452; Saffold v. S., 60 Miss. 928.

Missouri. Snowden v. S., 8 Mo. 483; S. v. Littlepage, 30 Mo. 322; S. v. Heed, 62 Mo. 559; S. v. Millsaps, 69 Mo. 359; S. v. McElhaney, 20 Mo. Ap. 584; S. v. Austin, 141 Mo. 481, 43 S. W. 165; S. v. Baughman (Mo. Ap. 1903), 74 .S W. 433.

Montana. S. v. Wrote, 19 Mont. 209, 47 P. 898.

New Jersey. Slape v. S., 15 Vroom, 264.

New York. P. v. Hainer, 1 Denio. 454; P. v. Blackman, 1 Denio, 632; P. v. Wissig, 7 Daly, 23; P. v. Devlin, 7 Daly, 47; Champlain v. P., 2 Comst. 82.

North Carolina. Smith v. Kiser, 98 N. C. 379, 4 S. E. 204; S. v. Jenkins, 121 N. C. 637, 28 S. E. 413.

§ 264 n. 1. **Sureties of Peace.**—A recognizance to keep the peace is not forfeited by anything done out of the State.[39] Drunkenness with disorderly conduct is not necessarily a breach;[40] a libel is.[41]

Ohio. S. v. Johnson, 13 Ohio, 176.

Oregon. Hannah v. Wells, 4 Or. 249; Malheur County v. Carter, 52 Or. 616, 98 P. 489.

Pennsylvania. C. v. Boult, 1 Browne, 237; Borlin v. C., 99 Pa. 42.

South Carolina. Reynolds v. Harral, 2 Strob. 87; S. v. Ahrens, 12 Rich. 493.

Tennessee. S. v. Johnson, 6 Bax. 198; S. v. Patterson, 7 Bax. 246; Brewer v. S., 6 Lea, 198; S. v. Frankgoo, 114 Tenn. 76, 85 S. W. 79.

Texas. Waughhop v. S., 6 Tex. 337; S. v. Warren, 17 Tex. 283; S. v. Thompson, 18 Tex. 526; Shrader v. S., 30 Tex. 386; Cowen v. S., 3 Tex. Ap. 380; Hedrick v. S., 3 Tex. Ap. 570; Walter v. S., 6 Tex. Ap. 254; Sass v. S., 8 Tex. Ap. 426; Stephenson v. S., 9 Tex. Ap. 459; S. v. Ward, 9 Tex. Ap. 462; Robinson v. S., 11 Tex. Ap. 309; Collins v. S., 12 Tex. Ap. 356; Hart v. S., 13 Tex. Ap. 555; Heath v S., 14 Tex. Ap. 213; McWhorter v. S., 14 Tex. Ap. 239; Goodwin v. S., 14 Tex. Ap. 443; Galindo v. S., 15 Tex. Ap. 319; Hester v. S., 15 Tex. Ap. 418; Short v. S., 16 Tex. Ap. 44; Thrash v. S., 16 Tex. Ap. 271; Collins v. S., 16 Tex. Ap. 247; Watkins v. S., 16 Tex. Ap. 646; Lindley v. S., 17 Tex. Ap. 120; Thompson v. S., 17 Tex. Ap. 318; Anderson v. S., 19 Tex. Ap. 299; Werbiski v. S., 20 Tex. Ap. 132; Holt v. S., 20 Tex. Ap. 271; Reddick v. S., 21 Tex. Ap. 267, 17 S. W. 465; Ware v. S., 21 Tex. Ap. 328, 17 S. W. 624; Garrison v. S., 21 Tex. Ap. 342, 17 S. W. 351; Baker v. S., 21 Tex. Ap. 359, 17 S. W. 265; Faubion v. S., 21 Tex. Ap. 494, 2 S. W. 830; Baker v. S., 23 Tex. Ap. 657, 5 S. W. 130; Hutchings v. S., 24 Tex. Ap. 242, 6 S. W. 34; Lee v. S., 25 Tex. Ap. 331, 8 S. W. 277; Childers v. S., 25 Tex. Ap. 658, 8 S. W. 928; Phipps v. S., 25 Tex. Ap. 660, 8 S. W. 929; Cravey v. S., 26 Tex. Ap. 84, 9 S. W. 62; Douglass v. S., 26 Tex. Ap. 248, 9 S. W. 733; Bailey v. S., 26 Tex. Ap. 341, 9 S. W. 758; Brown v. S., 28 Tex. Ap. 65, 11 S. W. 1022; Wegner v. S., 28 Tex. Ap. 419, 13 S. W. 608; Hughes v. S., 28 Tex. Ap. 499, 13 S. W. 777.

Virginia. C. v. Haines, 2 Va. Cas. 134; C. v. Walton, 1 Va. Cas. 142.

Wisconsin. S. v. Wettstein, 64 Wis. 234.

United States. U. S. v. Winstead, 4 Hughes, 464; U. S. v. Evans, 2 Flip. 605; Kirk v. U. S. 131 Fed. 331.

39. Key v. C., 3 Bibb, 495.

40. Rankin v. C., 9 Bush, 553.

41. Respublica v. Cobbet, 3 Yeates, 93. For other points see C. v. Braynard, 6 Pick. 113; Crump v. P., 2 Colo. 316; Rex v. Benn, Cas. temp. Hardw. 98; ante, §§ 183, 207 (3), 229 (3).

2. **This Chapter,**—More perplexing both to writer and reader than the average, because of the greater and more diverse mingling of statutory provisions with those of the common law, will be found in practice reasonably plain and informing to one who, at each step, compares with it the legislation of his own State.

CHAPTER XVIII.

THE PRESENCE OF THE PRISONER IN COURT.

§ 265. 1. **The Doctrine of this Chapter**—is that, subject to exceptions and qualifications to appear as we proceed, an indicted person must be present in court whenever any essential thing is done against him.[42]

2. **The Reasons**—are two,—first, to enable the prosecuting power to identify him, and to inflict on him the pronounced punishment;[43] secondly, to secure to him full facilities for defence. The one reason is in the interest of the State; the other, of the defendant.[44] And these differing

42. Hooker v. C., 13 Grat. 763; Fight v. S., 7 Ohio, pt. 1, 180, 28 Am. D. 626; Dunn v. C., 6 Pa. 384; S. v. Craton, 6 Ire. 164; Sneed v. S., 5 Pike, 431, 41 Am. D. 102; P. v. Genet, 59 N. Y. 80, 17 Am. R. 315; S. v. Alman, 64 N. C. 364; Brown v. S., 24 Ark. 620; P. v. Charles, Edm. Sel. Cas. 264; Rolls v. S., 52 Miss. 391; S. v. Epps, 76 N. C. 55; S. v. Greer, 22 W. Va. 800; Welch v. Barber, 52 Conn. 147; S. v. Smith, 31 La. Ann. 406; Allen v. C., 86 Ky. 642; Bond v. C., 83 Va. 581, 3 S. E. 149; Adams v. S., 28 Fla. 511, 10 So. 106; Lovett v. S., 29 Fla. 356, 1 So. 172; Brown v. S., 29 Fla. 543, 10 So. 736; Harris v. P., 130 Ill. 547, 22 N. E. 826; S. v. Smith, 44 Kan. 75, 24 P. 84, 21 Am. St. 266, 8 L. R. A. 774; Allen v. Com., 86 Ky. 642, 6 S. W. 645, 9 Ky. L. 784; S. v. Mannon, 19 Utah, 505, 57 P., 542, 75 Am. St. 753; 45 L. R. A. 638; Coleman v. Com., 90 Va. 635, 19 S. E. 161; French v. S., 85 Wis. 400, 55 N. W. 566, 39 Am. St. 855, 21 L. R. A. 402; Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262; Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011. Also holding accused cannot waive his right to be present.

43. Rex v. Gibson, 2 Stra. 968; Rex. v. Nicolls, 2 Stra. 1227; McGowan v. P., 104 Ill. 100, 44 Am. R. 87.

44. S. v. Jefcoat, 20 S. C. 383, 386; S. v. Hoffman, 78 Mo. 256;

reasons, we shall see, are sometimes dissimilar in their effects upon a particular argument or question.

3. **How Chapter divided.**—We shall consider of this subject, I. In General; II. During the Trial; III. At the Sentence; IV. Between the Verdict and Sentence.

I. *In General.*

§ 266. 1. **Some Lack of Uniformity**—is noticeable in our American cases on this subject, arising in part from differing views of judges, and in part from differing statutes in the respective States. So that—

2. **The Elucidations of this Chapter**—must be contemplated by the practitioner in special connection with the decisions and statutes of his own State. Again,—

3. **Waiver,**—by the prosecuting power on the one hand, and by the defendant on the other, is a common element in these cases;[45] and it depends largely upon the grade and nature of the offence, and the sort of step in question. Ordinarily, and by most opinions, one may waive his right if the prosecuting attorney and the court do not object to be present at any steps in a misdemeanor case;[46] seldom, yet as to some things not absolutely never, in felony.[47]

Rutherford v. C., 78 Ky. 639; Owen v. S., 38 Ark. 512; Smith v. S., 51 Wis. 615, 37 Am. R. 845, 8 N. W. 410; Hopt v. Utah, 110 U. S. 574, 4 S. C. 202.

45. Ante, § 116a et seq.; Waller v. S., 40 Ala. 325; S. v. Perkins, 40 La. Ann. 210, 3 So. 647; S. v. Hope, 100 Mo. 347, 13 S. W. 490.

46. S. v. Guinness, 16 R. I. 401, 16 A. 910; Fugler v. S., 58 Miss. 829; S. v. Garland, 67 Me. 423; S. v. Young, 86 Iowa, 406, 53 N. W. 272; Payne v. Com., 16 Ky. L. 839, 30 S. W. 416; Sharp v. Com., 16 Ky. L. 840, 30 S. W. 414; S. v. Dry, 152 N. C. 813, 67 S. E. 1000; Shifleet v. Com., 90 Va. 386, 18 S. E. 838; U. S. v. Leckie, 26 Fed. Cas. No. 15,583, 1 Sprague, 227; U. S. v. Mayo, 26 Fed. Cas. No. 15,754, 1 Curt. 433.

47. Post, § 271; Martin v. S., 40 Ark. 364; S. v. Somnier, 33 La. Ann. 237; Summeralls v. S., 37 Fla. 162, 20 So. 242; Barton v. S., 67 Ga. 653, 44 Am. R. 743; Robson v. S., 83 Ga. 166, 9 S. E. 610; Lyons v. S., 7 Ga. Ap. 50, 66 S. E. 149; S. v. Moran, 46 Kan. 318, 26 P. 754; S. v. Perkins, 40 La. Ann. 210, 3 So. 647; Com. v. McCarthy, 163 Mass. 458, 40 N. E. 1047; Frey v. Cir. Judge, 107 Mich. 130, 64 N. W. 1047; Price v. S., 36 Miss. 531, 72 Am. Dec. 195; Gales v. S., 64 Miss. 105, 8 So. 167;

§ 267. **Appearance—Default.**—Judgment on summons and default[48] is unknown in criminal cases. The defendant must first appear. "Some Acts of Parliament," said an English judge, "gives justices of peace a power of proceeding upon default; but *exceptio probat regulam in rebus non exceptis.*" [49]

§ 268. 1. **A Personal Appearance**—and plea in person are necessary at the arraignment; this cannot be by attorney.[50] The exception is that,—

2. **In a Misdemeanor**—Punishable only by fine without imprisonment, for special cause shown, and as a favor to the defendant, he will be permitted to plead by attorney. In this sort of case, with the consent of the court, the trial may go on in his absence,[51] yet still the court has the election to decline.[52]

S. v. Smith, 90 Mo. 37, 1 S. W. 753; S. v. Dry, 152 N. C. 813, 67 S. E. 1000; Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 28 L. Ed. 262; Lewis v. U. S., 146 U. S. 370, 13 S. Ct. 136, 36 L. Ed. 1011.

48. Ante, § 4.

49. Reg. v. Simpson, 10 Mod. 248, 250. And see Bigelow v. Stearns, 19 Johns. 39, 10 Am. D. 189; Sailer v. S., 1 Harrison, 357; C. v. Cheek, 1 Duv. 26.

50. Younger v. S., 2 W. Va. 579, 98 Am. D. 791; S. v. Meekins, 41 La. Ann. 543, 6 So. 822. See S. v. Jones, 70 Iowa, 505, 30 N. W. 750; S. v. Hairston, 121 N. C. 579, 28 S. E. 492; Wells v. Terrell, 121 Ga. 368, 49 S. E. 319.

51. Ex parte Tracy, 25 Vt. 93; Warren v. S., 19 Ark. 214, 68 Am. D. 214; U. S. v. Leckie, 1 Sprague, 227; Steele v. C., 3 Dana, 84. Contra, Slocovitch v. S., 46 Ala. 227. In California, there is a statute giving force to this doctrine, and perhaps extending it. P. v. Thompson, 4 Cal. 238. And see U. S. v. Shepherd, 1 Hughes, 520; Luther v. S., 27 Ind. 47; Canada v. C., 9 Dana, 304; Bloomington v. Heiland, 67 Ill. 278; S. v. Reckards, 21 Minn. 47. In a case before one of the circuit courts of the United States, Curtis, J., after conferring with the District Judge Sprague, stated the following as the conclusion to which the two judges had arrived on the subject of pleading, in misdemeanors, by attorney.

"1. To save his recognizance, even in case of a misdemeanor, the defendant must appear personally.

"2. He is liable to be called on his recognizance at any time, either on the motion of the District Attorney, or by the order of the court on its own motion, if it sees cause to direct it.

"3. It is in the discretion of the court to allow one indicted for a misdemeanor to plead and defend in his absence, by attorney. This

§ 269. 1. **Motions—Questions of Law.**—If we look upon all the cases as correctly decided, they furnish no absolutely uniform rule as to whether or not the prisoner must be present at the hearing of a motion.[53] But if it relates to a mere matter of law, or if in any other form a question simply of law is agitated, the better doctrine both in reason and authority is, that he may be absent at the argument unless the court sees fit to require his presence.[54] For where no fact *in pais* is involved, and all is of law, there is nothing which a lay prisoner can do or suggest in the case; his interests are then wholly in the keeping of his counsel. And even a fact *in pais*, blending with a question of law, may be so remote or collateral as not to require the prisoner's presence; for example, the amending of an information by altering the name of the owner of stolen property,[55] the considering and making of an order changing

discretion will be regulated by the following circumstances:

"1. That it is not an offense for which imprisonment must be inflicted.

"2. The court must be satisfied that the nature of the case, and its circumstances, are such that imprisonment will not be inflicted.

"3. The District Attorney must consent, or it must appear to the court that he unreasonably and improperly withholds his consent.

"4. Sufficient cause must be shown, on affidavit, to account for the absence of the defendant.

"5. A special power of attorney, to appear and plead and defend in his absence, must be executed by the defendant, and filed in court by the attorney." U. S. v. Mayo, 1 Curt. C. C. 433, 434. Though statute permits verdict in misdemeanour in absence of prisoner, he has a right to be present, which he may waive by voluntary absence. S. v. Waymire, 52 Ore. 281, 97 Pac. 46; P. v. Brewer, 142 Ill. Ap. 610; Carter v. P., 122 Ill. Ap. 77; Walston v. Com., 21 Ky. L. 378, 102 S. W. 275; Loving v. S. (Tex. 1907), 100 S. W. 154; S. v. Dry, 152 N. C. 813, 67 S. E. 1000.

52. Bridges v. S., 38 Ark. 510.

53. See post, §§ 276, 277.

54. Schwab v. Berggran, 143 U. S. 442, 449, 12 S. Ct. 525; S. v. Jefcoat, 20 S. C. 383, 386; Miller v. S., 29 Neb. 437, 45 N. W. 451; Griffin v. S., 34 Ohio St. 299; Fielden v. Illinois, 143 U. S. 452, 12 S. Ct. 528; Territory v. Gay, 2 Dak. 125; Ex parte Waterman, 33 Fed. 29; Epps v. S., 102 Ind. 539, 1 N. E. 491; Christ v. P., 3 Colo. 394; P. v. Vail, 6 Abb. N. Cas. 206, 57 How. Pr. 81; S. v. Paylor, 89 N. C. 539; Long v. S., 52 Miss. 23; Kelly v. S., 3 Sm. & M. 518, 528; Jewell v. C., 22 Pa. 94, 101; P. v. Galvin, 9 Cal. 115; post, § 276; P. v. Arberry, 13 Cal. App. 749, 114 P. 411.

55. S. v. Dominique, 39 La. Ann. 323, 1 So. 665.

the venue,[56] assigning the case for trial[57] or issuing an attachment for a witness,[58] the drawing of a special venire,[59] the hearing of a motion for continuance,[60] or the taking of the recognizance of a witness.[61]

2. **Notice of a Motion**—should be duly given to counsel.[62]

3. **If the Prisoner has escaped,**—or if otherwise he is voluntarily absent, no steps in his behalf should ordinarily be permitted until he returns and submits to the law; because the ends of justice may require him to be held to answer to some other proceeding[63] should this one be reversed, and because if his objection is not sustained his presence will be required for sentence or some other step.[64] Yet where objections like these do not intervene, the court if it sees fit, accepting his act as a waiver of the right to be present,[65] may proceed—for example, by taking a ver-

56. S. v. Elkins, 63 Mo. 159; Hopkins v. S., 10 Lea, 204; Polk v. S., 45 Ark. 165; Rothschild v. S., 7 Tex. Ap. 519. Contra, Ex parte Bryan, 44 Ala. 402.

57. S. v. Le Blanc, 116 La. 822, 41 So. 105. The better practice, in capital cases, is deemed in Alabama to have him present. Hall v. S., 40 Ala. 698, 705.

58. S. v. Clark, 32 L. Ann. 558.

59. Pocket v. S., 5 Tex. Ap. 552; Mabry v. S., 50 Ark. 492; Stoball v. S., 116 Ala. 454, 23 So. 162; Hurd v. S., 116 La. 440, 22 So. 993, 8 S. W. 823. See Bearden v. S., 44 Ark. 331; Maxwell v. S., 89 Ala. 150, 7 So. 824.

60. S. v. Fahey, 35 La. Ann. 9.

61. Bolling v. S., 54 Ark. 588, 16 S. W. 658.

62. Wheeler v. S., 14 Ind. 573; 1 Chit. Crim. Law, 492. See Sutcliffe v. S., 18 Ohio, 469, 51 Am. D. 459. Presence of accused not required on examination of juror with consent of attorney. Howard v. Com., 118 Ky. 1, 25 Ky. Law 2213, 80 S. W. 211; affirmed in 200 U. S. 164, 26 S. Ct. 189.

63. Ante, § 229 (2); S. Ex rel. Battle, 7 Ala. 259.

64. Anonymous, 31 Me. 592; Wilson v. C., 10 Bush, 526, 19 Am. R. 76; Gresham v. S., 1 Tex. Ap. 458; S. v. Rippon, 2 Bay, 99; Sailer v. S., 1 Harrison, 357; C. v. Andrews, 97 Mass. 543; S. v. Murrell, 33 S. C. 83, 11 S. E. 682; Sargent v. S., 96 Ind. 63; P. v. Tremayne, 3 Utah, 331, 3 P. 85; S. v. Conners, 20 W. Va. 1; S. v. Sites, 20 W. Va. 13; S. v. Pickett, 94 N. C. 971; S. v. McMillan, 94 N. C. 945; Taylor v. S., 3 Tex. Ap. 387; Young v. S., 3 Tex. Ap. 384; S. v. Porter, 41 La. Ann. 402, 6 So. 337; Warwick v. S., 73 Ala. 486, 49 Am. R. 59; Madden v. S., 70 Ga. 383; McGowan v. P., 104 Ill. 100, 44 Am. R. 87; S. v.

dict,[66] by hearing an appeal in a matter of law,[67] though perhaps not all courts will in any case of escape grant such hearing[68]—as though the prisoner were present. A statute permitting a trial for felony to go on while the prisoner voluntarily absents himself, does not deprive him of the constitutional right to be present.[69]

§ 270. **Presence of Counsel.**—When the defendant's presence is, in the lower misdemeanors, dispensed with, counsel must represent him at the trial;[70] and he must always be present at least by attorney. But the presumed authority of an attorney does not extend to waiving his client's presence; he should be specially empowered.[71] There are statutory rights to have counsel at the trial, but they differ from his own right of personal presence.[72]

II. *During the Trial.*

§ 271. 1. **Waiver,**—already explained,[73] is a specially disturbing element in this sub-title. Assuming, as it seems

Edwards, 36 La. Ann. 863; S. v. Barton, 32 La. Ann. 278.

65. Ante, § 266 (3); S. v. Jacobs, 107 N. C. 772, 22 Am. St. 912, 11 S. E. 962; Warwick v. S., 73 Ala. 486, 49 Am. R. 59; C. v. Andrews, 97 Mass. 543; Falk v. U. S., 15 A. D. C. 446; Hill v. S., 118 Ga. 21, 44 S. E. 820; Peterson v. S., 64 Neb. 875, 90 N. W. 964.

66. Robson v. S., 83 Ga. 166, 9 S. E. 610; Lynch v. C., 88 Pa. 189, 32 Am. R. 445; S. v. Kelly, 97 N. C. 404, 2 Am. St. 299, 2 S. E. 185; Welch v. Stiles, 47 Iowa, 171; Reg. v. Carrick-on-Suir, 16 Cox C. C. 571; Sturgeon v. Gray, 96 Ind. 166; Barton v. S., 67 Ga. 653; Lassiter v. S., 67 Ga. 739; Sahlinger v. P., 102 Ill. 241; S. v. Guinness, 16 R. I. 401, 16 A. 910; S. v. Perkins, 40 La. Ann. 210, 3 So. 647; Fight v. S., 7 Ohio, pt. 1, 180, 28 Am. D. 626; Price v. S., 36 Miss. 531, 72 Am. D. 195. Not all courts, or always in these cases, will take the verdict. S. v. Hurlbut, 1 Root, 90; Sneed v. S., 5 Pike, 431, 41 Am. D. 102. And see S. v. Wamire, 16 Ind. 357; S. v. Gorman (Minn. 1911), 129 N. W. 589.

67. S. v. Jacobs, 107 N. C. 772, 11 S. E. 962, 22 Am. St. 912; McGowan v. P., 104 Ill. 100, 44 Am. R. 87.

68. P. v. Genet, 59 N. Y. 80, 17 Am. R. 315; Smith v. U. S., 94 U. S. 97; Woodson v. S., 19 Fla. 549.

69. Gore v. S., 52 Ark. 285, 2 S. W. 564; S. v. Hope, 100 Mo. 347, 13 S. W. 490.

70. Ante, § 268 (2) and note.

71. P. v. Petry, 2 Hilton, 523. And see Sweeden v. S., 19 Ark. 205; Rex v. Fielder, 2 D. & R. 46; Shipp v. S., 11 Tex. Ap. 46; post, § 273.

72. Martin v. S., 51 Ga. 567; P. v. Trim, 37 Cal. 274; Beaumont v. S., 1 Tex. Ap. 533, 28 Am. R. 424; P. v. Cassiano, 30 Hun, 388.

73. Ante, §§ 266 (3), 269 (3).

we may, that any waiver in a misdemeanor case will be effectual, there are steps in which, by the decisions, the presence may be, and others in which it cannot be, waived in—

2. **Felony.**—The objection to allowing universal waiver is substantially public, not altogether private.[74] The public has an interest in the life and liberty of the accused person. "Neither," said the Supreme Court of the United States by Harlan, J., "can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. . . . If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."[75] Added to which reason, it was said by Gibson, C. J., to be contrary to the dictates of humanity to let a prisoner "waive that advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defence with indulgence."[76] An examination of the authorities cited to this section, and to the other sections referred to herein, shows that some courts apply this doctrine to all felonies, others permit waiver in those less than capital.[77] And there is a distinction between the right to waive the presence during the main trial, and while some collateral thing[78] is being done.

§ 272. 1. **The Rendition of the Verdict,**—leaving out of view the question of waiver, is a step at which the pris-

74. Ante, §§ 265 (2), 269 (3); Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202.

75. Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202.

76. Prine v. C., 18 Pa. 103, 104.

77. S. v. Kelly, 97 N. C. 404, 2 Am. St. 299, 2 S. E. 185. And see Waller v. S., 40 Ala. 325, 333; Green v. P., 3 Colo. 68; Jackson v. C., 19 Grat. 656; Hill v. S., 17 Wis. 675, 86 Am. D. 736; S. v. Reckards, 21 Minn. 47; post, § 272; McLendon v. S., 96 Miss. 250, 50 So. 864; Warfield v. S., 96 Miss. 170, 50 So. 561; Humphrey v. S., 3 Okla. Cr. 504, 106 P. 978.

78. Ante, § 269 (1); S. v. Cherry, 154 N. C. 624, 70 S. E. 294.

oner's right to be present is perfect.[79] But his counsel need not be present if the party does not suffer from his absence,[80] otherwise if he does.[81] And the New Jersey Court has held, as the result of legislation, that a verdict in any non-capital case is good though the prisoner is absent.[82]

2. **The Discharge of the Jury,**—because unable to agree,[83] has been held to require the prisoner's presence, since he might urge something why it should not be done.[84] Yet is not this a question of law, within a distinction already appearing?[85] But if a fact requiring the discharge is to be established,—as, the sickness of one of the panel,—plainly the prisoner must be present.[86]

3. **Disorderly Conduct**—of the prisoner at the trial, such in degree that it cannot go on, has been held to justify the court in removing him, and proceeding in his absence.[87]

79. Finch v. S., 53 Miss. 363; Wells v. S., 147 Ala. 140, 41 So. 630; Dix v. S., 147 Ala. 70, 41 So. 924; Temple v. Com., 77 Ky. 709; Com. v. Gabor, 209 Pa. 201, 58 A. 278; Stubbs v. S., 49 Miss. 716; Dougherty v. C., 69 Pa. 286; S. v. Ott, 49 Mo. 326; Slocovitch v. S., 46 Ala. 227; Beaumont v. S., 1 Tex. Ap. 533, 28 Am. R. 424; Stewart v. S., 7 Coldw. 338; S. v. Bray, 67 N. C. 283; S. v. Jones, 61 Mo. 232, 235; S. v. Spores, 4 Ore. 198; Rose v. S., 20 Ohio, 31; S. v. Epps, 76 N. C. 55; Temple v. C., 14 Bush, 769, 29 Am. R. 442; S. v. Ford, 30 La. Ann. 311; S. v. Christian, 30 La. Ann. 367; Smith v. P., 8 Colo. 457. See Gage v. S., 9 Tex. Ap. 259; Smith v. S., 59 Ga. 513, 27 Am. R. 393, 8 P. 920; Emery v. S. (Tex. Cr Ap. 1908, 123 S. W. 133; Gilligan v. Com., 99 Va. 816, 37 S. E. 962; French v. S., 85 Wis. 400, 55 N. W. 566, 39 Am. St. 855, 21 L. R. A. 402; Lyons v. S., 7 Ga. Ap. 50, 66 S. E. 149; Stoddard v. S., 132 Wis. 520, 112 N. W. 453. The receipt of the verdict and discharge of the jury in his absence operate as an acquittal, though the jury be recalled thereafter and, in his presence the verdict is read and the jury polled. Harris v. S., 153 Ala. 19, 49 So. 458.

80. Richardson v. S., 7 Tex. Ap. 486; Penn v. S., 62 Miss. 450; O'Bannon v. S., 76 Ga. 29.

81. Smith v. S., 51 Wis. 615, 8 N. W. 410.

82. Jackson v. S., 20 Vroom. 252.

83. New Crim. Law, I, § 1033-1036.

84. S. v. Wilson, 50 Ind. 487. Contra, Walker v. S., 117 Ala. 42, 23 So. 149; S. v. Wilson, 50 Ind. 487, 19 Am. St. 719; S. v. Holloway, 57 Ore. 162, 110 P. 791, denying motion for rehearing, 110 P. 397.

85. Ante, § 269 (1). Humphrey v. S., 3 Okla. Cr. Ap. 504, 106 P. 978.

86. S. v. Smith, 44 Kan. 75, 21 Am. St. 266, 24 P. 84.

87. U. S. v. Davis, 6 Blatch. 464. And see McCorkle v. S., 14 Ind. 39.

§ 273. During Entire Trial.—Except as already appearing, the doctrine is that in felony or treason the accused must be present at every material stage in the trial,[88]—as, the swearing of the witnesses and the giving in of the evidence, the charge to the jury, special instructions during its deliberations, the rendition of the verdict,—else there can be no valid judgment against him.[89] It is not sufficient that his counsel are present and not objecting.[90] If the jury comes into court for instructions, or on any other like errand, and is simply sent back, the prisoner cannot complain that he was not present.[91] And no inad-

88. Adams v. S., 28 Fla. 511, 10 So. 106; Allen v. C., 86 Ky. 642, 6 S. W. 645; Bond v. C., 83 Va. 581, 3 S. E. 149; S. v. Greer, 22 W. Va. 800; Percer v. S., 118 Tenn. 765, 103 S. W. 780; Stanley v. S., 97 Miss. 860, 53 So. 497.

89. Rolls v. S., 52 Miss. 391; S. v. Alman, 64 N. C. 364; Dodge v. P., 4 Neb. 220; Shapoonmash v. U. S., 1 Wash. 219; S. v. Barnes, 59 Mo. 154; Graham v. S., 40 Ala. 659; Younger v. S., 2 W. Va. 579, 98 Am. D. 791; S. v. Blackwelder, Phillips, N. C., 38; Gladden v. S., 12 Fla. 562; P. v. Miller, 33 Cal. 99; S. v. Bertin, 24 La. Ann. 46; P. v. Stuart, 4 Cal. 218; Maurer v. P., 43 N. Y. 1; S. v. Dooly, 64 Mo. 146, 149; S. v. Allen, 64 Mo. 67; Burley v. S., 1 Neb. 385; Jackson v. C., 19 Grat. 656; Holton v. S., 2 Fla. 476; Clark v. S., 4 Humph. 254; Andrews v. S., 2 Sneed, 550; S. v. France, 1 Tenn. 434; P. v. Perkins, 1 Wend. 91; S. v. Cross, 27 Mo. 332; Nomaque v. P., Breese, 109; S. v. Hughes, 2 Ala. 102, 36 Am. D. 411; S. v. Buckner, 25 Mo. 167, decided, however, on a statute; P. v. Kohler, 5 Cal. 72; Cole v. S., 5 Eng. 318; Sneed v. S., 5 Pike, 431, 41 Am. D. 102; Gandolfo v. S., 11 Ohio St. 114; Crusen v. S., 10 Ohio St. 258; P. v. Bealoba, 17 Cal. 389; Wilson v. S., 87 Ga. 583; Tuttle v. S., 6 Tex. Ap. 556; Ball v. U. S., 140 U. S. 118, 11 S. Ct. 761; Roberts v. S., 111 Ind. 340, 12 N. E. 500; S. v. Myrick, 38 Kan. 238, 16 P. 330; Barton v. S., 9 Tex. Ap. 261; Bearden v. S., 44 Ark. 331; Rutherford v. C., 78 Ky. 639; S. v. Davenport, 33 La. Ann. 231; Meece v. C., 78 Ky. 586; Vanderford v. S., 126 Ga. 753, 55 S. E. 1025; Warfield v. S., 96 Miss. 170, 50 So. 561; Com. v. House, 28 Pittsb. Leg. J. (N. S.) 210, 41 W. N. C. 246; S. v. Detwiler, 60 W. Va. 583, 55 S. E. 654; Sadler v. S., 98 Miss. 401, 53 So. 783.

90. Rose v. S., 20 Ohio, 31; Maurer v. P., 43 N. Y. 1; Jones v. S., 26 Ohio St. 208; Linbeck v. S., 1 Wash. 336; Bonner v. S., 67 Ga. 510; S. v. Jenkins, 84 N. C. 812, 37 Am. R. 643.

91. Lawrence v. C., 30 Grat. 845; S. v. Jones, 29 S. C. 201, 7 S. E. 296. Compare Kinnemer v. S., 66 Ark. 206, 49 S. W. 815; Stroope v. S., 72 Ark. 379, 80 S. W. 749; Holland v. P., 30 Colo. 94, 69 P. 519; Crowell v. P., 190 Ill. 508, 60 N. E. 872 on instructions given in the absence of the accused.

"No writ," said Holt, C. J., "can be granted to seize a man and set him in the pillory."[1] The reader will perceive that this excellent reason does not cover the case of a man whom the court, by its mittimus, has possession of through its jailer. And it is not impossible that the doctrine of the prisoner's presence at the sentence may receive some judicial modifications hereafter.

3. **Abate Nuisance.**—The judgment to abate a nuisance can commonly be rendered only when the defendant is present.[2]

IV. *Between the Verdict and Sentence.*

§ 276. 1. **General.**—The distinctions stated in our first sub-title should under this one be considered by the practitioner; they need not here be repeated.

2. **New Trial.**—Those distinctions conduct to the conclusion that the prisoner's presence should be required or not, at a hearing for a new trial, according to the particular question. If it is of mere law, the presence is not as of course essential; but if the defendant is not in custody, the court may demand it as a means of getting possession of him. If the hearing is attended by an inquiry into a fact, the common rule that the defendant must be present prevails. The judges have not always had the distinctions in mind. We have authority for saying that even in a capital case the defendant's "counsel may ask for a new trial in his absence."[3] And the like appears in various

v. Simpson, 10 Mod. 341, 344; Fielden v. Illinois, 143 U. S. 452, 12 S. Ct. 528.

1. Rex v. Harris, 1 Ld. Raym. 267, Comb. 447, 448, Holt, 399, Skin. 684; Rex v. Harrison, 12 Mod. 156; Duke's Case, Holt, 399; Rex v. Harwood, 2 Stra. 1088. Still, upon affidavit of general infirmity, the court will dispense with his personal presence. Rex v. Constable, 7 D. & R. 663, 3 B. & Ad. 659, note. In Iowa, by statute, judgment in cases of misdemeanor may be rendered in the absence of the defendant. Hughes v. S., 4 Iowa, 554.

The Effect of Absence—is not necessarily to require a new trial; but the sentence, being void, may be repronounced in due form. Cole v. S., 5 Eng. 318.

2. Reg. v. Chichester, 2 Den. C. C. 458, 8 Eng. L. & Eq. 294.

3. Jewell v. C., 22 Pa. 94, 101, 102; C. v. Costello, 121 Mass. 371. That the prisoner may waive his right of personal presence, S. v. Somnier, 33 La. Ann. 237.

2. **On a Rule to show Cause,**—the personal presence seems not to be deemed necessary;[13] but the contrary has been intimated.[14]

3. **On a Writ of Error,**—there is some confusion as to how the question stands; but in general, and in the absence of any special occasion, the personal presence seems not to be essential.[15]

4. **On Appeal,**—the nature of the case, illumined by the foregoing principles, will decide thhe question; which will sometimes be one way, sometimes the other. Where the punishment is a mere fine, the personal presence will not ordinary be required.[16]

13. P. v. Van Wyck, 2 Caines, 333.

14. P. v. Freer, 1 Caines, 485.

15. Donnelly v. S., 2 Dutcher, 463, 601; P. v. Clark, 1 Par. Cr. 360. That the personal presence is necessary, see Reg. v. Foxby, 6 Mod. 178.

16. S. v. Buhs, 18 Mo. 318.

CHAPTER XIX.

THE PROSECUTING COUNSEL OF THE GOVERNMENT.

Compare—with chapters on the Trial, post, §§ 959g-982a; on Nolle Prosequi, post, §§ 1387-1396; and on various other particular proceedings.

§ 278. 1. **Private Prosecutor.**—Anybody who suspects another of crime is entitled to prefer against him an accusation.[17] He is termed the prosecutor.[18] Commonly he is one particularly aggrieved, yet not necessarily.[19] In England, most criminal prosecutions are thus set on foot by private persons, and conducted to the end by lawyers whom they employ,[20] with only slight official supervision. But—

2. Public Prosecutor.—With us, both under the States and the United States, criminal prosecutions before the higher tribunals are, if not always instituted, with scarcely an exception carried on, by a public prosecuting officer of the legal profession. He manages the cause in every stage of it before the court, and in most of the States [21] before the grand jury also. He is known as District Attorney, State's Attorney, Attorney-General, and so on, according to the nomenclature of the differing laws. Descending now to particulars,—

3. **How Chapter divided.**—We shall consider, I. The Appointment and Compensation; II. The Duties and Powers.

17. 1 Chit. Crim. Law, I.

18. Post, § 690 et seq.; S. v. Millain, 3 Nev. 409. See S. v. Gossage, 2 Swan (Tenn.), 263; Bedford v. S., 2 Swan, (Tenn.), 72; S. v. Cohn, 9 Nev. 179; U. S. v. Sanford, 27 Fed. Cases 952

19. And see Rex v. Wood, 3 B. & Ad. 657; P. v. District Court, etc., 29 Colo. 5, 66 P. 896.

20. Reg. v. Gurney, 11 Cox C. C. 414.

21. S. v. Addison, 2 S. C. 356; post, § 861.

I. *The Appointment and Compensation.*

§ 279. Appointment—Grade—Vacancy.—The appointment and grade of prosecuting officers are variously regulated by our State and national constitutions and statutes.[22] It is the same of filling a vacancy or empowering a substitute.[23] Even,—

§ 280. Absent.—Without the aid of any written law, the court may appoint an attorney or counsellor, who is one of its officers, to act in the place of the prosecuting officer should he fail to appear.[24] Though by the Constitution

22. P. v. Albany Common Pleas, 19 Wend. 27; P. v. May, 3 Mich. 598; Collins v. S., 8 Ind. 344; S. v. Shufflebarger, 4 Ind. 532; Barkwell v. S., 4 Ind. 179; Parker v. Smith, 3 Minn. 240, 74 Am. D. 749; Ex parte Bouldin, 6 Leigh, 639; Hyde v. Trewhitt, 7 Coldw. 59; Bridgman v. Grafton, 51 Vt. 478; S. v. Jackson, 9 Mont. 508, 24 P. 213; P. v. Annis, 10 Colo. 53, 14 P. 52; Blair v. Marye,80 Va. 485; S. v. Swinney, 25 Mo. Ap. 347; Cropsey v. Henderson, 63 Ind. 268; Hench v. S., 72 Ind. 297; S. v. Barrow, 30 La. Ann. 657; In re Snell, 58 Vt. 207, 1 A. 566; S. v. Morris, 1 Houst. Crim. 124; S. v. Harris, 12 Nev. 414; S. v. Clough, 23 Minn. 17; S. v. Geiger, 65 Mo. 306; Thompson v. Carr, 13 Bush, 215; Fant v. Gibbs, 54 Miss. 396; S. v. Steele, 33 La. Ann. 910; Moser v. Long, 64 Ind. 189; In re Leaken, 137 Fed. 680; Com. v. Havrilla, 38 Pa. Super Ct. 292; S. v. Walton, 53 Ore. 557, 99 P. 431 rehearing denied, 101 P. 389; Childs v. S., 4 Okla. Cr. Ap. 474, 113 P. 545.

23. Hite v. S., 9 Yerg. 198; Staggs v. S., 3 Humph. 372; C. v. King, 8 Gray, 501; Keithler v. S., 10 Sm. & M. 192, 224, 235; Ex parte Diggs, 50 Ala. 78; Diggs v. S., 49 Ala. 311; S. v. Lackey, 35 Tex. 357; P. v. Delaware, 45 N. Y. 196; Hackey v. S., 15 Ga. 400; Statham v. S., 41 Ga. 507; C. v. McCombs, 56 Pa. 436; S. v. Manlove, 33 Tex. 798; Pippin v. S., 2 Sneed, 43; S. v. Boudreaux, 14 La. Ann. 88; S. v. Bass. 12 La. Ann. 862; Wilson v. P., 3 Colo. 325; Woods v. S., 6 Bax. 426; S. v. Garrett, 29 La. Ann. 637; S. v. Griffin, 87 Mo. 608; P. v. Trombley, 62 Mich. 278; S. v. Sweeney, 93 Mo. 38, 5 S. W. 614; Joyner v. S., 78 Ala. 448; S. v. Montgomery, 41 La. Ann. 1087, 6 So. 803; S. v. Johnson, 41 La. Ann. 1076, 6 So. 802; Simonton v. S., 44 Fla. 289, 31 So. 821; S. v. Commissioners, 60 Neb. 275, 83 N. W. 70.

24. White v. Polk, 17 Iowa, 413, 414; Dukes v. S. 11 Ind. 557, 71 Am. D. 370; S. v. Johnson, 12 Tex. 231; Tesh v. C., 4 Dana, 522; Ex parte Diggs, 50 Ala. 78; Reg. v. Page, 2 Cox C. C. 221. See Collins v. S., 8 Ind. 344; Mitchell v. S., 22 Ga. 211, 232, 68 Am. D. 493; S. v. Delesdenier, 7 Tex. 76, 96; Kouns v. Draper, 43 Mo. 225; S. v. Gonzaes, 26 Tex. 197; Diggs v. S., 49 Ala. 311; S. v. Duncan, 116 Mo. 288, 22 S. W. 699, 152 U. S. 377, 14 S.

such office is elective, still in the absence of the incumbent the judge may substitute one *pro tempore*.[25] And the appointee is to consider himself as counsel for the people in all respects, with full power to appear before the grand jury and, not a mere assistant to the judge in examining witnesses.[26]

§ 281. **Assistance,**—which may be necessarily or convenient, for the prosecuting officer, is variously provided for.[27] There are States in which this officer may appoint a deputy,[28] but this power is believed to be exceptional. While unquestionably he may have help in various things by those whose acts are subordinate to his will, he is, properly viewed a minister of justice who cannot delegate discretionary functions.[29] On general principles, in some States supplemented by statutes and in others not, he may by leave of the court have the assistance of other lawyers in conducting a cause therein.[30] That they are paid by the party in-

Ct. 570, 38 L. Ed. 85; S. v. Smith, 107 La. 129, 31 So. 693; Spaulding v. S., 61 Neb. 289, 85 N. W. 80; S. v. Moxley, 102 Mo. 374, 15 S. W. 556.

25. Keithler v. S., 10 Sm. & M. 192, 224, 235; Mahaffey v. Ter., 11 Okla. 213, 66 P. 342; S. v. Corcoran, 7 Idaho, 220, 61 P. 1034; King v. S., 43 Fla. 11, 31 So. 254; Jackson v. Com., 96 Va. 107, 30 S. E. 452.

26. Reg. v. Littleton, 9 Car. & P. 671; S. v. Lackey, 35 Tex. 357.

27. For example, Territory v. Harding, 6 Mont. 323; Biemel v. S., 71 Wis. 444, 37 N. W. 244; Price v. S., 35 Ohio St. 601; S. v. Anderson, 29 La. Ann. 774; Wood v. S., 92 Ind. 269; P. v. Bemis, 51 Mich. 422, 16 N. W. 794; P. v. Warren, 14 Bradw. 296; In re Gilson, 34 Kan. 641, 9 P. 763; Clinton v. S., 58 Fla. 23, 50 So. 580; S. v. Bezou, 48 La. Ann. 1369, 20 So. 892.

28. S. v. Harris, 12 Nev. 414; Brown's Ap., 79 Mo. Ap. 159; Canada v. Ter., 12 Okla. 409, 72 P. 375; S. v. Walton, 53 Ore. 557, 99 P. 43, rehearing denied, 101 P. 389, 102 P. 173.

29. Engle v. Chipman, 51 Mich. 524, 16 N. W. 886.

30. Hopper v. C., 6 Grat. 684; Shelton v. S., 1 Stew. & P. 208; P. v. Blackwell, 27 Cal. 65; Ulrich v. P., 39 Mich. 245; S. v. Wilson, 24 Kan. 189, 36 Am. R. 257; Polin v. S., 14 Neb. 540, 16 N. W. 898; C. v. Scott, 123 Mass. 222, 25 Am. R. 81; Burkhard v. S., 18 Tex. Ap. 599; Rounds v. S., 57 Wis. 45, 14 N. W. 865; S. v. Shinner, 76 Iowa, 147, 40 N. W. 144. See Beauchamp v. S., 6 Blackf. 299; P. v. Turcott, 65 Cal. 126, 3 P. 461; Yolo County v. Joyce (Fla. 1909), 50 So. 580; P. v. Biles, 2 Idaho, 114, 6 P. 120; S. v. Cobley, 128 Iowa, 114, 103 N. W. 99; S. v. Wells, 54 Kan. 161, 37 P. 1005; S. v. Petrich, 122 La. 127, 47 So. 438; P. v. Perriman, 72 Mich. 184, 40 N. W. 425; P. v.

jured or his friends,[31] or appear at the request of the Governor of another State,[32] does not render them incompetent. As the office is statutory,[33] and the statutes differ, the minor doctrines on this subject may not be exactly alike in the several States. But—

§ 282. 1. **Discretionary.**—The permitting of this sort of assistance, the number of counsel, and the bounds for those assisting, are believed to be everywhere within the judicial discretion of the court.[34] And the court ought to select those who are in a condition to, and who will, act impartially and justly.[35] Still,—

2. **The Control**—of the cause should be with the public attorney; hence, also, the appointment itself should be made only with his concurrence.[36]

Wood, 99 Mich. 620, 58 N. W. 638; S. v. Orrick, 106 Mo. 111, 17 S. W. 176, 329; S. v. Tighe, 27 Mont. 327, 71 P. 8; Reed v. S., 2 Okla. Cr. Ap. 589, 103 P. 1042; S. v. Johnson, 24 S. D. 590, 124 N. W. 847; Bowner v. S., 55 Tex. Cr. Ap. 416, 116 S. W. 798; S. v. O'Brien, 35 Mont. 482, 90 P. 514; Bush v. S., 62 Neb. 128, 86 N. W. 1062.

31. S. v. Bartlett, 55 Me. 200; Keyes v. S., 122 Ind. 527, 23 N. E. 1097; Thalheim v. S., 38 Fla. 169, 20 So. 938; Bergstrasser v. P., 134 Ill. Ap. 609; Hayner v. P., 213 Ill. 142, 72 N. E. 792; S. v. Rue, 72 Minn. 296, 75 N. W. 235; S. v. Tighe, 27 Mont. 327, 71 P. 3.

32. U. S. v. Hanway, 2 Wal. Jr. 139.

33. P. v. Corning, 2 Comst. 9, 18, 49 Am. D. 364.

34. Edwards v. S., 47 Miss. 581; P. v. Montague, 71 Mich. 318, 447, 39 N. W. 60, 585; C. v. Knapp, 9 Pick. 496, 20 Am. D. 491; Hinsdale County v. Crump, 18 Colo. Ap. 59, 70 P. 159; Thalheim v. S., 38 Fla. 169, 20 So. 938; Shular v. S., 105 Ind. 289, 4 N. E. 870, 55 Am. St. 211; S. v. Fitzgerald, 49 Iowa, 260, 31 Am. St. 148; Com. v. Scott, 123 Mass. 222, 25 Am. St. 81; P. v. Foote, 93 Mich. 38, 52 N. W. 1036; S. v. Borgstrom, 69 Minn. 508, 72 N. W. 799, 975; S. v. Lem Woon, 57 Ore. 482, 107 P. 974; S. v. Johnson, 24 S. D. 590, 124 N. W. 847; S. v. Ward, 61 Vt. 153, 17 Atl. 483; S. v. Hoshor, 26 Wash. 643, 67 P. 386; S. v. Moxley, 102 Mo. 374, 14 S. W. 989, 15 S. W. 556; P. v. O'Farrell, 247 Ill. 44, 93 N. E. 136; Johns v. S., 88 Neb. 145, 129 N. W. 247; Galloway v. S., 88 Neb. 447, 129 N. W. 987.

35. Sneed v. P., 38 Mich. 248; Lawrence v. S., 50 Wis. 507, 7 N. W. 343; P. v. Hurst, 41 Mich. 328, 1 N. W. 1027; P. v. Wright, 89 Mich. 70, 50 N. W. 792; S. v. Halstead, 73 Iowa, 376, 35 N. W. 457. One who has been retained by the prisoner in the case, should not be allowed afterward to assist in the prosecution. Wilson v. S., 16 Ind. 392. See S. v. Ward, 61 Vt. 153, 17 A. 483.

36. C. v. Williams, 2 Cush. 582. And see C. v. Knapp, 10 Pick. 477, 20 Am. D. 534; C. v. Knapp, 9 Pick.

latter doubtless may, in most instances, take them into his hands if he chooses.[42]

§ 286. **The Compensation**—of the prosecuting officer is variously regulated in the different States. It is commonly by salary; in connection with which, or without it, he has in some a special fee, or costs, or both.[43] An assistant or sub-

42. Ante, § 33 (1); Treasurer v. Rice, 11 Vt. 339; Portland v. Rolfe, 37 Me. 400; S. v. Roney, 37 Iowa, 30; Santo v. S., 2 Iowa, 165; C. v. Connecticut River Rld., 15 Gray, 447; Work v. Wapello, 73 Iowa, 357, 35 N. W. 452; P. v. Vinton, 82 Mich. 39, 46 N. W. 31; Bridgman v. Grafton, 51 Vt. 478; Foster v. Clinton, 51 Iowa, 541, 2 N. W. 207; S. v. Morgan, 62 Ind. 35; P. v. Police Justice, 41 Mich. 224, 2 N. W. 25; In re Snell, 58 Vt. 207, 1 A. 566; McCurdy v. N. Y. Life Insurance Co., 4 Det. Leg. N. 798, 115 Mich. 20; Hill v. Butler Co., 195 Mo. 511, 94 S. W. 518.

43. **Alabama.** Dent v. S., 42 Ala. 514; S. v. Stone, 72 Ala. 185; Birmingham Water Works v. S., 159 Ala. 118, 48 So. 658.

Arkansas. Hall v. Doyle, 35 Ark. 445; Patton v. S., 41 Ark. 486; Fanning v. S., 47 Ark. 442, 2 S. W. 70.

California. Pillsbury v. Brown, 45 Cal. 46; Pillsbury v. Brown, 47 Cal. 477; Jones v. Morgan, 67 Cal. 308, 7 P. 734.

Georgia. Robinson v. Smith, 57 Ga. 332.

Illinois. P. v. Christerson, 59 Ill. 157.

Indiana. Rawley v. Vigo, 2 Blackf. 355; Blythe v. S., 4 Ind. 525; S. v. Denny, 67 Ind. 148; S. v. Jackson, 68 Ind. 58; S. v. Peterson, 74 Ind. 174; S. v. Barron, 74 Ind. 374.

Iowa. Ellis v. Jackson, 38 Iowa, 175; Smith v. Linn, 55 Iowa, 232, 7 N. W. 510; Dubuque County v. Fitzpatrick (Iowa, 1909), 121 N. W. 15.

Kansas. Donelson v. Howard, 23 Kan. 70; Huffman v. Greenwood, 25 Kan. 64.

Kentucky. Speckert v. Louisville, 78 Ky. 287; Money v. Beard & Marshall (Ky. 1909), 124 S. W. 282.

Massachusetts. C. v. Munn, 14 Gray, 361.

Michigan. Detroit v. Whittemore, 27 Mich. 281; Videto v. Jackson, 31 Mich. 116.

Minnesota. Hawkins v. Watkins, 34 Minn. 554, 27 N. W. 65.

Mississippi. Charter v. S., 36 Miss. 75.

Missouri. S. v. Thompson, 39 Mo. 427; Vastine v. Voullaire, 45 Mo. 504; S. v. Peck, 51 Mo. 111; S. v. Foss, 52 Mo. 416; In re Murphy, 22 Mo. Ap. 476.

Montana. Williams v. Jefferson, 2 Mont. 26.

New Jersey. S. v. Passaic Freeholders, 13 Vroom, 533.

New York. P. v. New York, 1 Hill (N. Y.), 362.

North Carolina. S. v. Tyler, 85 N. C. 569; Moore v. Roberts, 87 N. C. 11.

Oregon. In re Claim of Ison, 6 Or. 469; Colvig v. Klamath, 16 Or. 244.

stitute is not necessarily paid by the public, but sometimes he is.[44]

II. *The Duties and Powers.*

§ 287. 1. **In Other Connections,**—throughout this volume, most of the duties and powers of the prosecuting officer are in detail explained.

2. **In Brief,**—he is the attorney and agent of the government in whatever concerns his office, and he should perform all acts required by the situation; as, cause the witnesses to be subpoenaed,[45] see that proceedings are regular,[46] and attend to various other things.[47] But it is not his duty to act beyond his own district or other limits of his jurisdiction,[48] nor should he assume powers not granted by the laws,[49] or employ his office for private ends.[50]

Tennessee. Dyer v. S., 9 Yerg. 395; S. v. Graves, 6 Bax. 488; Wright v. Shelby, 9 Bax. 145; Knox v. S., 9 Bax. 202; S. v. Kennedy, 4 Lea, 223; S. v. Miller, 4 Lea, 734, S. v. Frost, 4 Lea, 735; S. v. Foster, 4 Lea, 736; S. v. Lowenstine, 4 Lea, 737; S. v. Bachman, 6 Lea, 649; Keys v. S., 7 Lea, 408; Leach v. S., 8 Lea, 35.

Texas. Spencer v. Galveston, 56 Tex. 384.

Virginia. Thon v. C., 77 Va. 289; Blair v. Marye, 80 Va. 485.

United States. U. S. v. Waters, 133 U. S. 208, 10 S. C. 249; s. c. nom. Waters v. U. S., 21 Ct. Cl. 30; Beckwith v. U. S., 16 Ct. Cl. 250.

44. Kouns v. Draper, 43 Mo. 225; S. v. Hocking, 40 Ohio St. 331; S. v. Ocean Freeholders, 8 Vroom, 417. County is liable, Mathews v. Lincoln Co., 90 Minn. 348, 97 N. W. 1015; Hinsdale Co. v. Crump, 18 Colo. Ap. 59, 70 P. 159; Contra, Turner v. Board of Coms., 158 Ind. 166, 63 N. E. 210 and see Miller v. Buena Vista Co., 68 Iowa, 711, 28 N. W. 91; Trapp v. S., 120 Ala. 397, 24 So. 1001.

45. U. S. v. Durling, 4 Bis. 509.

46. Campbell v. P., 22 Ill. 234.

47. Consult, for example, Hannah v. Wells, 4 Ore. 249; U. S. v. Blaisdell, 3 Ben. 132; In re Attorney-General, Mart. & Yerg. 285; Bennett v. S., 8 Humph. 118; S. v. Cross, 2 Humph. 301; P. v. Tweed, 13 Abb. Pr. n. s. 25; S. v. Southern Pacific Rld., 24 Tex. 80; C. v. Hipple, 69 Pa. 9; P. v. Ingersoll, 58 N. Y. 1, 17 Am. R. 178; P. v. Miner, 2 Lans. 396; S. v. Tufts, 56 N. H. 137; Attorney-General v. Hane, 50 Mich. 447, 15 N. W. 549; Hill v. Butler Co., 195 Mo. 511, 94 S. W. 518.

48. Leavenworth v. Brewer, 9 Kan. 307; S. v. Whitworth, 26 Mont. 107, 66 P. 748.

49. Julian v. S., 122 Ind. 68, 23 N. E. 690; Goar v. Rosenberg (Tex. 1909), 115 S. W. 653.

50. P. v. Wabash, etc. Ry., 12 Bradw. 263; P. v. Bemis, 51 Mich.

3. **Prosecute or not.**—A leading function is to determine whether or not to commence a particular prosecution, or to discontinue[51] one already begun. If, as it sometimes happens, the law is but technically violated, it may not be for the public interest to punish the doer;[52] in which case this public officer should forbear. He cannot go a step further and make an agreement not to prosecute,[53] or bind the court as to what shall be the punishment on conviction.[54] In exercising his discretion, he should consider that—

6. **The Power of Pardon,**—pertains to another office, not his. Therefore it may be his duty to pursue one whom the Governor ought to pardon. Again,—

§ 289. **The Legislature,**—not he, makes the laws. So if he deems a law unwise, mischievous, or in violation of natural right, still he is not therefore to decline carrying on the prosecution. To his official eyes, all the laws must seem good because they are such in the eyes of the power that rightly made them.[55] But still—

§ 290. **Discretionary.**—There are circumstances wherein plainly he has the discretion to carry on, or not, a prosecution which the law and facts will sustain. If, for instance, there was a technical crime, with no violation of the spirit and intent of the inhibition, but by some slip in its terms a man is caught in a net not spread for him, the prosecuting officer, representing the public, should decline a prosecution. For if he carries it on, while he wrongs the individual, he brings disgrace upon the law and the community. Again,—

§ 291. **A Trivial or Accidental Offence**—he will not always notice; as a right-minded individual, who owns a

522, 6 N. W. 794; Engle v. Chipman, 51 Mich. 524, 16 N. W. 886.

51. Post, § 1387 et seq.; S. v. Hospers (Ia.), 126 N. W. 818; Bartley v. S., 53 Neb. 310, 73 N. W. 744.

52. New Crim. Law, I, § 210; Abbey v. S., 55 Tex. Cr. Ap. 232, 115 S. W. 1191; Beecher v. Anderson, 45 Mich. 543, 8 N. W. 539.

53. S. v. Lopez, 19 Mo. 254; S. v. Bain, 112 Ind. 335. And see Bennett v. S., 2 Yerg. 472; ante, § 40.

54. S. v. Reininghaus, 43 Iowa, 149.

55. And see McDonald v. P., 126 Ill. 150, 9 Am. St. 547, 18 N. E. 817.

4. **Fact.**—He should never, at any stage of the cause, state as a fact anything except what is in evidence, or in good faith he expects to prove, nor state it out of its time and place.[61]

5. **Tricks to convict.**—It is not his duty or right to gain an advantage over the prisoner at the trial by any deception,[62] or employ tricks to procure his conviction.[63] Still, one defending by counsel cannot justly expect the prosecuting officer to argue both sides. Justice is commonly best promoted by leaving it to the respective counsel to present each the cause of his client in its clearest light. But where the prisoner has no legal help, or his lawyer makes some great slip in the management of his cause, the counsel for the public should not press an advantage to obtain an unjust conviction.[64] Even—

61. Cheatham v. S., 67 Miss. 335, 19 Am. St. 310, 7 So. 204; Newby v. P., 28 Colo. 16, 62 P. 1035; Leahy v. S., 31 Neb. 566, 48 N. W. 390; Randall v. S., 132 Ind. 539, 32 N. E. 305; Cook v. C., 86 Ky. 663, 7 S. W. 155; Turner v. S., 4 Lea, 206; S v. Williams, 63 Iowa, 135, 18 N. W. 682; P. v. Mitchell, 62 Cal. 411; Miller v. S., 27 Tex. Ap. 63, 10 S. W. 445; Allen v. S., 66 Miss. 385, 6 So. 242; Beasley v. S., 98 Ark. 324, 135 S. W. 895; Kirksey v. S. (Tex. Cr. Ap. 1911), 135 S. W. 124.

62. March v. S., 44 Tex. 64; Curtis v. S., 6 Coldw. 9; Hurd v. P., 25 Mich. 406, 415, 416; P. v. Lee Chuck, 78 Cal. 312, 20 P. 719; P. v. Carr, 64 Mich. 702, 31 N. W. 590; S. v. Irwin, 9 Idaho, 35, 71 P. 608; P. v. Dane, 59 Mich. 550, 26 N. W. 781; P. v. Pang, Sui Lin, 15 Cal. Ap. 260, 114 P. 582; P. v. McCann, 247 Ill. 130, 93 N. E. 100.

63. S. v. Hagan, 164 Mo. 654, 65 S. W. 249.

64. In an English case for murder, where the prisoner was defended by counsel, "in opening the case," says the report, "Corbett, for the prosecution, said that he should state to the jury the whole of what appeared on the depositions to be the facts of the case, as well those which made in favor of the prisoner as those which made against her, as he apprehended his duty, as counsel for the prosecution, to be to examine the witnesses who would detail the facts to the jury, after having narrated the circumstances in such way as to make the evidence, when given, intelligible to the jury; not considering himself as counsel for any particular side or party. He then opened the whole of the facts," etc. Gurney, B., who presided at the trial, observed: "The learned counsel for the prosecution has most accurately conceived his duty, which is to be assistant to the court in the furtherance of justice, and not to act as counsel for any particular person or party." Reg

CHAPTER XX.

COUNSEL FOR THE DEFENDANT.

Compare—with the last chapter; with that on the Trial, post, §§ 959g-982a; and with New Crim. Law, I, §§ 279 (4), 376 (4), note, par. 12, 895.

§ 295. **How Chapter divided.**—We shall consider, I. The Right to have Counsel; II. Appointment and Compensation; III. Proceeding without Counsel; IV. Duty of Counsel.

I. *The Right to have Counsel.*

§ 296. **The Old Law**—on this subject is already somewhat explained.[68] One on a trial of fact before a jury, in treason or felony, could not have the help of a lawyer, though the case against him was conducted by counsel. But if a question of law arose, he could have counsel to argue it to the court for him.[69] And—

§ 297. **On a Collateral Issue,**—for example, to plead a pardon,[70]—there might be counsel; no special assignment of them was necessary.[71]

§ 298. **In Misdemeanor,**—counsel appear always to have been permitted.[72] So also in the now obsolete proceeding by appeal.[73]

68. Ante, §§ 14-22.

69. Ante, § 120 (2); Chit. Crim. Law, 407; 2 Hawk. P. C. c. 39, §§ 1, 4; Withipole's Case, Cro. Car. 147; Charnock's Case, 12 How. St. Tr. 1377, 1382; Pantaleon Sa's Case, 5 How. St. Tr. 461, and notes; Rex v. Thomas, 2 Bulst. 147; Fulwood's Case, Cro. Car. 482.

70. 2 Hawk. P. C. c. 39, § 5.

71. Rex v. O'Carny, T. Jones, 180; Rex v. Davis, 1 Bur. 638; Rex v. Johnson, 2 Stra. 824; Burgess's Case, Cro. Car. 365; Ratcliffe's Case, Foster, 40; Harvey's Case, Foster, 51.

72. 1 Chit. Crim. Law, 409; ante, §§ 18, 20 (2).

73. 2 Hawk. P. C. c. 39, § 3.

II. *Appointment and Compensation.*

§ 303. 1. **Appoint or not—Whom.**—When, under the old English practice, counsel were in treason or felony permitted to argue a question of law for the prisoner, they were assigned by the court.[81] With us, it being in all criminal trials a right to have them, they commonly appear as of course, much as in civil causes. And still, in capital cases, and in others where the prisoner is unable to pay for the service, the assigning of counsel is the ordinary course.[82] A sane prisoner will not have counsel thrust upon him against his remonstrance; or, it appears, without his affirmative consent.[83] Yet where he is unable to pay, he has no absolute right of choice, but must take the counsel whom the court, in the exercise of a just discretion, selects.[84] And even at the request of the prisoner, one of doubtful competency should not be appointed; or, ordinarily, one not an officer of the court, over whom therefore it has not control.[85] But—

2. **Insane.**—If there is ground to doubt the sanity of the prisoner, and this is to be a question at the trial, his insane objection should not, certainly in reason, prevent the court from assigning counsel. And the rule that a party may control or discharge his counsel[86] will be so far relaxed as, at least, to admit evidence of insanity against his will.[87]

81. Ante, §§ 296-298, and the places there referred to.

82. And see S. v. De Serrant, 33 La. Ann. 979; Charlton v. S., 106 Ga. 400, 32 S. E. 347; S. v. Rollins, 50 La. Ann. 925, 24 So. 664; Ryan v. S., 30 Ohio Cir. Ct. R. 306; Austin v. S. (Tex.), 51 S. W. 249.

83. Reg. v. Yscuado, 6 Cox C. C. 386; S. v. Moore, 121 Mo. 514, 26 S. W. 345, 42 Am. St. Rep. 542; S. v. Yoes, 67 W. Va. 546, 68 S. E. 181.

84. Burton v. S., 75 Ind. 477; Fambles v. S., 97 Ga. 625, 25 S. E. 365; Delk v. S., 99 Ga. 667, 26 S. E. 752; S. v. Whitesides, 49 La. Ann. 352, 21 So. 540; P. v. Fuller, 71 N. Y. Sup. 487; Baker v. S., 86 Wis. 474, 56 N. W. 1088.

85. C. v. Knapp, 9 Pick. 496, 498, 20 Am. D. 491. See, also, Donnelly v. S., 2 Dutcher, 463; Brown v. S., 7 Eng. 623; Reg. v. Southey, 4 Fost. & F. 864.

86. In re Paschal, 10 Wal. 483, 496; Carver's Case, 7 Ct. Cl. 499.

87. S. v. Patten, 10 La. Ann. 299, 63 Am. D. 594.

can enforce compensation from the county.[94] On the other hand,—

§ 306. **Not County.**—In a considerable number of States, the county is held not to be liable in these cases.[95]

III. *Proceeding without Counsel.*

§ 307. 1. **Even Capital Trials**—may proceed without defendant counsel; as, if refused by the prisoner.[96] And,—

2. **In Cases not Capital,**—it is in some of the States common to dispense with them, when the prisoner is poor, and none volunteer.[97]

3. **In Such Cases,**—the principles disclosed in this chapter and the last show that the judge, in manner and degree not inconsistent with the duties of the bench, should advise and assist the prisoner; and the prosecuting officer should avoid whatever might lead to an unjust conviction.[98] Again,—

§ 308. **Amicus Curiae.**—In these criminal cases, as in civil, and perhaps more appropriately, any lawyer may as friend of the court direct its attention to law-points, and

94. Webb v. Baird, 6 Ind. 13, 18; Blythe v. S., 4 Ind. 525; Montgomery v. Courtney, 105 Ind. 311. And see further, as to this State, Fountain v. Ward, 35 Ind. 70; Gordon v. Dearborn, 52 Ind. 322. The like is held in some of the other states. Carpenter v. Dane, 9 Wis. 274; Dane v. Smith, 13 Wis. 585, 80 Am. D. 754; Hall v. Washington, 2 Greene, Iowa, 473. See Samuels v. Dubuque, 13 Iowa, 536. And see Commissioners v. Hall, 7 Watts, 290. But see the next section as to Pennsylvania.

95. Vise v. Hamilton, 19 Ill. 78, 79; Rowe v. Yuba, 17 Cal. 61; Huntingdon v. C., 72 Pa. 80; Elam v. Johnson, 48 Ga. 348; Posey v. Mobile, 50 Ala. 6; Arkansas v. Freeman, 31 Ark. 266; Johnston v. Lewis, 2 Mont. 159; Johnson v. Whiteside, 110 Ill. 22. And see Cantrell v. Clark, 47 Ark. 239, 1 S. W. 200. Compensation under statute. S. v. Cater, 109 Iowa, 69, 80 N. W. 222; P. v. Coler, 168 N. Y. 643, 61 N. E. 1132. He may waive his right by failing to request counsel. S. v. Terry, 201 Mo. 697, 100 S. W. 432.

96. Reg. v. Yscuado, 6 Cox C. C. 386. And see Reg. v. Southey, 4 Fost. & F. 864. Error to deprive accused of counsel by suspending him for contempt, Charles v. S., 58 Fla. 17, 50 So. 419. See also, S. v. Yoes, 67 W. Va. 546, 68 S. E. 181.

97. And see S. v. Vianna, 37 La. Ann. 606.

98. And see ante, § 40.

the single defendant to violate the law in the particular for which he is indicted, and he seeks an acquittal avowedly to resume a life of law-breaking, the lawyer who helps him becomes in morals, probably also in law,[5] a partaker in the crime.

§ 311. Expressing Belief of Innocence.—As no prosecuting officer should declare to the jury his belief that the defendant is guilty,[6] so should no defending counsel be suffered to intrude into the case his belief that he is innocent. If the belief were, as it is not, competent evidence, it should be given under oath, be of the counsel's personal knowledge, and subjected to the test of a cross-examination. Therefore the practice, which before this section was originally written seems to have been tolerated in many courts, of counsel for defendants protesting in their addresses to the jury that they believe their clients to be innocent, should be frowned down and put down, and never be permitted to show itself more. If a prisoner is gulty, and he communicates the facts fully to counsel in order to enable the latter properly to conduct the defence, then if the counsel is an honest man, he cannot say he believes the prisoner innocent; but if he is a dishonest man, he will as soon say this as anything. Thus a premium is paid for professional lying. Again, if the counsel is a man of high reputation, a rogue will impose upon him by a false story, to make him an "innocent agent" in communicating a falsehood to the jury. Lastly, a decent regard for the orderly administration of justice requires that only legal evidence be produced to the jury; and the unsworn statement of the prisoner's counsel that he believes the prisoner innocent is not legal evidence. It is the author's cherished hope that he may live to see the day when no judge, sitting where the common law prevails, will ever in any circumstances permit such a violation of fundamental law, of true decorum, and of high policy, to take place in his presence, as is involved in the practice if which we are now speaking.[7]

5. New Crim. Law, I, § 895.

6. Ante, § 293 (3).

7. Judge Taschereau, in his excellent book collecting and commenting upon the Canada Criminal Law Acts, deems these suggestions

§ 312. **Testifying as Witness.**—At common law, a lawyer may testify in a cause he is trying, though practically it is not often wise for one to serve in this double capacity. A statute restricting the right was held not to prevent the Attorney-General giving evidence for the State.[8]

§ 313. 1. **Argue.**—The right to have counsel carries with it the right to have them argue the cause.[9] But it may be waived.[10] Still,—

2. **Limiting Counsel.**—The perversion of the right is another thing, and it need not be permitted. Therefore the court may limit the argument to a reasonable time, yet not so as to preclude a full hearing. The circumstances of cases differ, consequently no rule as to the bounds of the limitation is possible, except that a sound judicial discretion should be applied in each instance. And the discretion will not be revised by the higher tribunal unless it is abused or the party is injured.[11]

so important that he copies this section of my text in full. Vol. II, p. 240. I cite from the first edition. His industry next discovers a passage "on the same subject," Written by another author since this section appeared in the first edition of the present work, and copies it also. Ib. p. 241. This echo differs from most others in being more distinct and practical than the original. "To intrude," it says, "on the jury statements not legal evidence is an interference with public justice of such a character that, if persisted in, it becomes the duty of the court, in all cases where this can be done constitutionally, to discharge the jury and continue the case." So that if a lawyer for the defense finds his client about to be convicted, his course is to profess to the jury his belief in the unfortunate man's innocence; then, on the court interposing, "persist" therein; then "it becomes the duty of the court not to commit the lawyer for contempt, but to discharge the jury and continue the case!" Perhaps this method of defense is worth trying by some enterprising "ornament" of our profession. Who knows?

8. Hines v. S., 26 Ga. 614.

9. P. v. Keenan, 13 Cal. 581: Word v. C., 3 Leigh, 743; Stewart v. C., 117 Pa. 378, 11 A. 370. But see where an attorney at law testifies as a witness for accused. S. v. Gleim, 17 Mont. 17, 41 P. 998, 52 Am. St. 655; Com. v. Polichinus (Pa. 1910), 78 A. 382.

10. Palmer v. P.. 4 Neb. 68.

11. P. v. Kelly, 94 N. Y. 526; Carthaus v. S., 78 Wis. 560, 47 N. W. 629; S. v. Shores, 31 W. Va. 491, 13 Am. St. 875, 7 S. E. 413; S. v. Hall, 31 W. Va. 505, 7 S. E. 422; Sullivan v. S., 47 N. J. L. 151:

Williams v. C., 82 Ky. 640; S. v. Hoyt, 47 Conn. 518, 36 Am. R. 89; S. v. Caveness, 78 N. C. 484; Hayes v. S., 58 Ga. 35; S. v. Riddle, 20 Kan. 711; Dille v. S., 34 Ohio St. 617, 32 Am. R. 395; White v. P., 90 Ill. 117, 32 Am. R. 12; S. v. Collins, 70 N. C. 241, 16 Am. R. 771; Hart v. S., 14 Neb. 572, 16 N. W. 905; Wingo v. S., 62 Missis. 311; S. v. Wilson, 38 La. Ann. 261; Sullivan v. S., 17 Vroom, 446; Kizer v. S., 12 Lea, 564; Williams v. S., 60 Ga. 367, 27 Am. R. 412; P. v. Keenan, 13 Cal. 581; Lee v. S., 51 Missis. 566; S. v. Linney, 52 Mo. 40; Weaver v. S., 24 Ohio St. 584; Hunt v. S., 49 Ga. 255, 15 Am. R. 677; P. v. Tock Chew, 6 Cal. 636; S. v. Miller, 75 N. C. 73. And see C. v. Porter, 10 Met. 263; Lynch v. S., 9 Ind. 541; Waters v. S., 117 Ala. 108, 22 So. 490; P. v. Buck, 151 Cal. 667, 91 P. 532; Smith v. Com., 100 Ky. 133, 37 S. W. 586; S. v. Baker, 57 Kan. 541, 46 P. 947; Huskey v. S., 129 Ala. 94, 29 So. 838; Barr v. P., 30 Colo. 522, 71 P. 392; Sparks v. S., 111 Ga. 308, 35 S. E. 654; Harris v. Com., 25 Ky. Law 297, 74 S. W. 1044; P. v. Smith, 122 Mich. 284, 81 N. W. 107; S. v. Tighe, 27 Mont. 327, 71 P. 3; Bailey v. S., 37 Tex. Cr. 579, 40 S. W. 281; S. v. Mayo, 42 Wash. 540, 85 P. 251.

relationship to the party which commonly, by the unwritten rule, includes the fourth degree of consanguinity or affinity,[18]—affinity ceasing with the dissolution by death or otherwise of the marriage which created it, except as to children born of the cohabitation;[19] and never the kindred of the respective married persons being reckoned as in affinity to one another.[20] Again,—

3. **Consent or Waiver**—by the party cannot take away the disqualification of the judge, except in circumstances after which we need not here inquire,[21] or render the otherwise void proceeding under him good.[22] Still,—

4. **Statutory Methods**—for supplying the want of a qualified judge, in cases of emergency, have in some of the States been devised; but they are neither uniform nor universal. Commonly a member of the bar is in some manner substituted.[23] Likewise,—

limits of the doctrine, C. v. Worcester, 3 Pick. 462, 465; Kilbourn v. S., 9 Conn. 560; Davis v. S., 44 Tex. 523; C. v. Tuttle, 12 Cush. 502. If judge in liquor case is a well-known opponent of the traffic and has threatened in such case to convict, his refusal to vacate the bench is reversible error. Wathen Mueller & Co. v. Com., 133 Ky. 94, 116 S. W. 336. See, also McDonald's Adm'r v. Wallsend Coal & Coke Co. (Ky. 1909), 117 S. W. 349; Anderson v. Com. (Ky. 1909), 117 S. W. 364; S. v. Ledbeter, 111 Minn. 110, 126 N. W. 477.

18. Fort v. West, 53 Ga. 584; Deupree v. Deupree, 45 Ga. 414; Oakley v. Aspinwall, 3 Comst. 547; Chambers v. Clearwater, 1 Abb. Ap. 341; S. v. Thomas, 56 Me. 490; Sanborn v. Fellows, 2 Fost. N. H. 473, 481; Gill v. S., 61 Ala. 169; Fowler v. Brooks, 64 N. H. 423, 10 Am. St. 425, 13 A. 417; Moses v. Julian, 45 N. H. 52, 84 Am. D. 114, 120.

19. 1 Bishop Mar. Div. & S., § 742; post, § 901; Carman v. Newell, 1 Denio, 25; Winchester v. Hinsdale, 12 Conn. 88.

20. Post, § 901; 1 Bishop Mar. Div. & S. 744; Higbe v. Leonard, 1 Denio, 186; Ex parte Harris, 26 Fla. 77, 23 Am. St. 548; Hume v. Commercial Bank, 10 Lea, 1, 43 Am. R. 290.

21. 84 Am. D. 127, in the notes; Phillips v. Eyre, Law Rep., 6 Q. B. 1, 22.

22. Oakley v. Aspinwall, supra; Murray v. S., 34 Tex. 331; Cobb v. P., 84 Ill. 511; Haverly Invincible Mining Co. v. Howcutt, 6 Colo. 574; S. v. Weiskittle, 61 Md. 48. See S. v. Bishop, 7 Conn. 181; Lee v. British, Amer. Mrtge. Co. (Tex. 1908), 115 S. W. 320.

23. Ante, § 71 (6); Case v. S., 5 Ind. 1; Ex parte Skeen, 41 Ind. 418; Dukes v. S., 11 Ind. 557, 71 Am. D. 370; Peter v. S., 6 How. (Miss.) 326; Kennedy v. S., 53 Ind. 542; S. v. Phillips, 27 La. Ann. 663;

7. **Changes on Bench.**—The court and judge are distinguishable; so that one judge may try a prisoner and another sentence him,[28] and this principle applies to various like questions of judicial changes and substitutes. The number of judges required on the bench, and various similar things are determined by our differing statutes.[29] It does not render the doings invalid that more competent judges than the law demands sit together.[30]

§ 314 a. Particular Tribunals.—Multitudes of questions have arisen as to the organization, constitutionality, and jurisdiction in criminal causes of particular tribunals; but they depend mainly on the changing written laws of the various States, so that no expositions of them are desirable here. Yet the references in the note will be helpful in emergencies.[31]

in adjacent room, in hearing): S. v. Porter, 105 Ia. 677, 75 N. W. 519.

28. Pegalow v. S., 20 Wis. 61; Charles v. S., 4 Port. 107.

29. P. v. White, 22 Wend. 167; Stevens v. P., 1 Hill (N. Y.), 261; C. v. Hardy, 2 Mass. 303; S. v. Bryant, 21 Vt. 479; Rex v. Carlile, 4 Car. & P. 415; S. v. Abram, 4 Ala. 272; U. S. v. Gordon, 5 Blatch. 18; Bescher v. S., 32 Ind. 480; S. v. Lautenschlager, 22 Minn. 514; P. v. Barbour, 9 Cal. 230; P. v. Eckert, 16 Cal. 110; P. v. Henderson, 28 Cal. 465; Blend v. P., 41 N. Y. 604; P. v. Dohring, 59 N. Y. 374, 17 Am. R. 349; P. v. Shaw, 63 N. Y. 36; Duggins v. S., 66 Ind. 350.

30. McFarlan v. P., 13 Ill. 9. See P. v. White, 22 Wend. 167.

31. **Alabama.** Patilla v. The Governor, 5 Port. 232; S. v. Abram, 4 Ala. 272; Ex parte Sam, 51 Ala. 34; Wilson v. S., 52 Ala. 299; Blankenshire v. S., 70 Ala. 10; Martin v. S., 77 Ala. 1.

Arkansas. Dunn v. S., 2 Pike, 229, 35 Am. D. 54; S. v. Cox, 3 Eng. 436; Gooch v. S., 3 Eng. 448; S. v. Chapin, 17 Ark. 561, 65 Am. D. 452; Collier v. S., 20 Ark. 36; Jackson v. S., 29 Ark. 62; Watson v. S., 29 Ark. 299; Walker v. S., 35 Ark. 386; Brizzolari v. S., 37 Ark. 364; Morrison v. S., 40 Ark. 448.

California. P. v. Daniels, 1 Cal. 106; P. v. Peralta, 3 Cal. 379; Caulfield v. Hudson, 3 Cal. 389; P. v. Ah King, 4 Cal. 307; P. v. Applegate, 5 Cal. 295; P. v. Freeland, 6 Cal. 96; P. v. Shear, 7 Cal. 139; P. v. Fowler, 9 Cal. 85; P. v. Carabin, 14 Cal. 438; P. v. Apgar, 35 Cal. 389; In re Waring, 50 Cal. 30; P. v. Smallman, 55 Cal. 185; P. v. Pingree, 61 Cal. 141; P. v. Fahey, 64 Cal. 342, 30 P. 1030; Ex parte Donahue, 65 Cal. 474, 4 P. 449; P. v. Joselyn, 80 Cal. 544, 22 P. 217; Ex parte Neustadt, 82 Cal. 273, 23 P. 124.

Colorado. P. v. Rucker, 5 Colo. 455; Ex parte White, 5 Colo. 521.

Connecticut. Scot v. Turner, 1 Root, 163; Chapin v. S., 24 Conn.

§ 315. 1. **Concurrent Jurisdiction,**—where either of two courts may hear the same cause or question,[32] is a

32. S. v. Billington, 33 Me. 146; Jaquith v. Royce, 42 Iowa, 406.

(31—Continued)

236; S. v. Brown, 24 Conn. 316; S. v. Beecher, 25 Conn. 539; S. v. Clegg, 27 Conn. 593; S. v. Davidson, 40 Conn. 281.

Dakota. P. v. Sponsler, 1 Dak. 289, 46 N. W. 459.

District of Columbia. In re Esmond, 5 Mackey, 64.

Florida. Kennedy v. S., 15 Fla. 635; Ex parte Bell, 19 Fla. 608.

Georgia. Anthony v. S., 9 Ga. 264; Reich v. S., 53 Ga. 73; Porter v. S., 53 Ga. 236; Clifton v. S., 53 Ga. 241; Johnson v. S., 58 Ga. 397; Wetter v. Campbell, 60 Ga. 266; Rataree v. S., 62 Ga. 245.

Idaho. Hyde v. Harkness, 1 Idaho, 536.

Illinois. Laswell v. Hickox, 4 Scam. 181; Perry v. P., 14 Ill. 439; Bickerdike v. Dean, 21 Ill. 199; Hamilton v. Carthage, 24 Ill. 22; Mapes v. P., 69 Ill. 523; Ferguson v. P., 90 Ill. 510; Wilson v. P., 94 Ill. 426; Ingraham v. P., 94 Ill. 428; Brown v. Jerome, 102 Ill. 371; Weiss v. P., 104 Ill. 90; Hankins v. P., 106 Ill. 628; Reid v. Morton, 119 Ill. 118, 6 N. E. 414; Fanning v. P., 10 Bradw. 70; O'Donnell v. Chicago, etc. Ry., 22 Ill. Ap. 233; Neatherly v. P., 24 Ill. Ap. 273.

Indiana. Wilson v. S., 1 Blackf. 428; Cook v. S., 7 Blackf. 165; Nelson v. S., 2 Ind. 249; Smith v. S., 2 Ind. 251; Lindville v. S., 3 Ind. 580; Smith v. S., 4 Ind. 500; S. v. Nolan, 4 Ind. 508; Lichtenstein v. S., 5 Ind. 162; Wakefield v. S., 5 Ind. 195; Spencer v. S., 5 Ind. 41; Simington v. S., 5 Ind. 479; Lawrie v. S., 5 Ind. 525; Miller v. Snyder, 6 Ind. 1; Foley v. S., 9 Ind. 363; Ulmer v. S., 14 Ind. 52; Dougherty v. S., 20 Ind. 442; Hunter v. S., 29 Ind. 80; Dailey v. Indianapolis, 53 Ind. 483; S. v. Reitz, 62 Ind. 159; Kennedy v. Howard, 74 Ind. 87; Jenkins v. S., 78 Ind. 133; S. v. Creek, 78 Ind. 139.

Iowa. Sharp v. S., 2 Iowa, 454; Ellis v. S., 3 Iowa, 217; White v. S., 4 Iowa, 449; Walters v. S., 5 Iowa, 507; S. v. Moran, 7 Iowa, 236; S. v. Smith, 7 Iowa, 244; S. v. Church, 8 Iowa, 252; S. v. Burdick, 9 Iowa, 402; S. v. Shepard, 10 Iowa, 126; S. v. Carpenter, 23 Iowa, 506; Green v. Talbot, 36 Iowa, 499; Jaquith v. Royce, 42 Iowa, 406.

Kansas. S. v. Thoman, 10 Kan. 191; S. v. Lofland, 17 Kan. 390.

Kentucky. C. v. Alsman, 5 J. J. Mar. 23; C. v. Martin, 6 J. J. Mar. 616; C. v. Hopkinsville, 7 B. Monr. 38; Ashlock v. C., 7 B. Monr. 44; Cornelius v. C., 15 B. Monr. 539; C. v. Crump, 18 B. Monr. 469; Tesh v. C., 4 Dana, 522; Duncan v. C., 6 Dana, 295; C. v. Mills, 6 Bush, 296; Medcalf v. C., 84 Ky. 485, 1 S. W. 878.

Louisiana. S. v. Brunetto, 13 La. Ann. 45; S. v. Peter, 14 La. Ann. 521; S. v. Lartigue, 29 La. Ann. 774; S. v. Malloy, 30 La. Ann. 61; S. v. Crowley, 33 La. Ann. 782; S. v. Addotto, 34 La. Ann. 1; S. v. Livaudais, 34 La. Ann. 52; S. v. Chapman, 38 La. Ann. 348; S. v.

frequent condition of the law in probably all our States. And the rule for it is that the one wherein proceedings are first instituted will conduct the matter to the end, and the other is not authorized to interfere.[33]

33. Ex parte Robinson, 6 McLean, 355; Burdett v. S., 9 Tex. 43; Clepper v. S., 4 Tex. 242; In re Leland, 5 Bankr. Reg. 222; Mapes v. P., 69 Ill. 523; P. v. Briggs, 1 Dak. 302; Union Trust Co. v. Rockford, &c. Rld. 6 Bis. 197; S. v. Williford, 91 N. C. 529; McPike v. Wells, 54 Missis. 136; Estes v. Martin, 34 Ark. 410; S. v. Devers, 34 Ark. 188; Chapin v. James, 11 R. I. 86, 23 Am. R. 412; 1 Bishop Mar. Women, § 634.

(31—Continued)

Houston, 40 La. Ann. 393, 8 Am. St. 532; S. v. Pujo, 41 La. Ann. 346, 6 So. 339; S. v. Tranchon, 41 La. Ann. 619, 6 So. 328; S. v. Starks, 42 La. Ann. 315, 7 So. 540.

Maine. S. v. Stinson, 17 Me. 154; Osborne v. Sargent, 23 Me. 527; S. v. Furlong, 26 Me. 69; S. v. Pierre, 65 Me. 293; S. v. Mullen, 72 Me. 466; S. v. Jones, 73 Me. 280.

Maryland. Horsey v. S., 3 Har. & J. 2; Rawlings v. S., 2 Md. 201; S. v. Bogue, 5 Md. 352; Davis v. S., 7 Md. 151, 61 Am. D. 331; In re Glenn, 54 Md. 572.

Massachusetts. C. v. Leach, 1 Mass. 59; C. v. Knowlton, 2 Mass. 530; Pearce v. Atwood, 13 Mass. 324; C. v. Holmes, 17 Mass. 336; C. v. Pindar, 11 Met. 539; Webster v. C., 5 Cush. 386; C. v. Roark, 8 Cush. 210; C. v. Burding, 12 Cush. 506; Jones v. Robbins, 8 Gray, 329; C. v. O'Connell, 8 Gray, 464; C. v. Byce, 8 Gray, 461; C. v. Intoxicating Liquors, 103 Mass. 448; C. v. Intoxicating Liquors, 105 Mass. 176; C. v. MacLellan, 121 Mass. 31; Nolan's Case, 122 Mass. 330; C. v. Horregan, 127 Mass. 450; C. v. Smith, 138 Mass. 489.

Michigan. Nelson v. P., 38 Mich. 618; Faulks v. P., 39 Mich. 200, 33 Am. R. 374; Attorney-General v. Detroit, 40 Mich. 631; P. v. Hurst, 41 Mich. 328, 1 N. W. 1027; P. v. Colleton, 59 Mich. 573, 26 N. W. 771.

Minnesota. S. v. Bilansky, 3 Minn. 246; S. v. Byrud, 23 Minn. 29.

Mississippi. S. v. Holmes, Walk. (Miss.) 415; Byrd v. S., 1 How. (Miss.) 163; Young v. S., 2 How. (Miss.) 865; Dowell v. Boyd, 3 Sm. & M. 592; Jordan v. S., 32 Missis. 382; Browning v. S., 33 Missis. 47.

Missouri. Clay v. S., 6 Misso. 600; Cunningham v. S., 14 Mo. 402; S. v. Huffschmidt, 47 Mo. 73; S. v. Dougher, 49 Mo. 409; S. v. Barada, 49 Mo. 504; S. v. Lipscomb, 52 Mo. 32; S. v. Schuermann, 52 Mo. 165, 429; In re Jefferson v. Cowan, 54 Mo. 234; S. v. Wister, 62 Mo. 592; Ex parte Snyder, 64 Mo. 58; S. v. Sutton, 64 Mo. 107; S. v. Daniels, 66 Co. 192; S. v. Dodson, 72 Mo. 283; Steele v. Missouri Pac. Ry., 84 Mo. 57.

Nebraska. Brown v. S., 9 Neb. 157, 2 N. W. 378; Ex parte Craw-

2. **It may be created**—by express words in the Constitution or statutes; or, if a particular court has a jurisdiction, then a written law confers on another a like jurisdiction over the same offence, yet is silent as to the powers of the former, the jurisdiction becomes concurrent.[34] And—

34. Stat. Crimes, § 164; Cooke v. State Nat. Bank, 52 N. Y. 96; S. v. Gordon, 60 Mo. 383; Allen v. S., 5 Wis. 329; S. v. Wister, 62 Mo. 592; Neatherly v. P., 24 Ill. Ap. 273. If a statute creates a new offence and provides a tribunal, no other has jurisdiction. Aldrich v. Hawkins, 6 Blackf. 125.

(31—Continued)

ford, 12 Neb. 379, 11 N. W. 494; S. v. Page, 12 Neb. 386, 11 N. W. 495.

Nevada. S. v. Mills, 12 Nev. 403; S. v. Quinn, 16 Nev. 89.

New Hampshire. S. v. Taylor, 16 N. H. 477; S. v. Berritt, 17 N. H. 268; S. v. Arlin, 7 Fost. N. H. 116; S. v. Bean, 36 N. H. 122; S. v. Shattuck, 45 N. H. 205; S. v. Towle, 48 N. H. 97; S. v. Ray, 63 N. H. 406, 55 Am. R. 458, note.

New Jersey. S. v. Morris, etc. Co., 1 Green (N. J.), 192; S. v. Dilloway, 2 Vroom, 42; Howe v. Plainfield, 8 Vroom, 145; S. v. Beverly, 14 Vroom, 139; Payne v. Mahon, 15 Vroom, 213; Patterson v. S., 20 Vroom, 236.

New Mexico. Bray v. U. S., 1 New Mex. 1; Territory v. Valdez, 1 New Mex. 548.

New York. P. v. Youngs, 1 Caines, 37; P. v. Chenango, 1 Johns. Cas. 179; Sweet v. Clinton, 3 Johns. 23; P. v. Goodwin, 18 Johns. 187, 9 Am. D. 203; P. v. Vermilyea, 7 Cow. 108, 141; P. v. Tracy, 9 Wend. 265; P. v. Gay, 10 Wend. 509; Gay v General Sessions, 12 Wend. 272; P. v. Abbot, 19 Wend. 192; P. v. White, 22 Wend. 167; P. v. Brown, 23 Wend. 47; P. v. General Sessions, 3 Barb. 144; In re Wakker, 3 Barb. 162; P. v. Berberrich, 20 Barb. 224; P. v. Fisher, 20 Barb. 652, 2 Par. Cr. 402; P. v. Morgan, 65 Barb. 473; P. v. Wayne Sessions, 1 Par. Cr. 369; P. v. Henries, 1 Par. Cr. 579; P. v. O'Brien, 4 Par. Cr. 203; Real v. P., 42 N. Y. 270; Huber v. P., 49 N. Y. 132; P. v. Daniell, 50 N. Y. 274; P. v. Dohring, 59 N. Y. 374, 17 Am. R. 349; Gardner v. P., 62 N. Y. 299; P. v. Shaw, 63 N. Y. 36; Ryan v. P., 79 N. Y. 593; P. v. Porter, 90 N. Y. 68; In re Lord, 10 Abb. N. Cas. 293; Myers v. P., 14 Hun, 416; P. v. McDonald, 26 Hun, 156; P. v. Bates, 38 Hun, 180; P. v. Cooper, 42 Hun, 196; P. v. Parr, 42 Hun, 313.

Wandell, 21 Hun, 515;

North Carolina. S. v. Adam, 3 Hawks, 188; S. v. Allen, 3 Hawks, 614; S. v. Daniel, 3 Hawks, 617; S. v. Patterson, 1 Murph. 443; S. v. Hart, 4 Ire. 222; S. v. Bill, 13 Ire. 373; S. v. Harriet, 4 Jones (N. C.), 264; S. v. Prince, 63 N. C. 529; S. v. Jarvis, 63 N. C. 556; S. v. Dunlap, 65 N. C. 491, 6 Am. R. 746; S. v. Vermington, 71 N. C. 264; S. v. Cherry, 72 N. C. 123; S. v. Buck, 73 N. C. 266. 630; Washington v. Hammond, 76 N. C. 33; S. v.

BOOK IV.

THE INDICTMENT AND ITS INCIDENTS.

CHAPTER XXII.

PRELIMINARY AND IN GENERAL.

Consult—for some expansions of what is here stated in general, the remaining chapters of this book.

§ 318. **How Chapter divided.**—We shall consider, I. The Essence of the Averments; II. The Doctrine of Certainty; III. The Distinction of Law and Fact and its Consequences in Averment; IV. Some Collateral Things.

I. *The Essence of the Averments.*

§ 319. 1. **Defined.**—As there can be no conviction without allegation,[48a] which, we have seen,[49] must be as broad as the contemplated punishment, the indictment for any offense must charge every act made by the law essential to such punishment, and in a form of written words approved by the combined prior practice, the just reasoning of the law, and the statutes.

2. **Writing,**—which was unknown in the early ages of the world, is now required because of its accuracy and stability. When it was impossible, necessity rendered the proceedings without it good.[50] Instead whereof, in the

48a. Garnsey v. S., 4 Okla. Cr. 547, 112 P. 84.

49. Chapter, beginning ante, § 77.

50. Post, § 493 et seq.

§ 322. 1. **The Old Rules**—of criminal pleading, which we have seen[55] to be founded in fundamental reason, have not, like the old practice,[56] been to any considerable extent remoulded by the judicial hand. In the words of Lord Ellenborough, C. J., our judges have ordinarily deemed it their duty "to adhere to old forms, even if it were only for the sake of uniformity of proceeding."[57] A few intimations appear in our books of reports that nice distinctions in the indictment are disregarded now;[58] but in truth the rule of *stare decisis* governs this class of cases, the same as others, and happily it is in none a never-yielding bar to all improvement. But—

2. **Statutes,**—which to a large extent have been enacted under the idea that the old rules are more imperfect than in truth they are, exert now a wide influence in our criminal pleading.[59] While from their misconceptions some of them have been harmful, they have on the whole removed many excrescences, and in various States have conducted the indictment to the happy conclusion that what plainly and distinctly, in language intelligible to the defendant and his jury, individualizes[60] every element of the crime meant, suffices.[61]

S., 6 Humph. 204, 206, "that in indictments for misdemeanors we will not require as great certainty as in indictments for felonies." To the like effect, see U. S. v. Lancaster, 2 McLean, 431; Gallagher v. S., 26 Wis. 423, 425. So in U. S. v. Davis, 5 Mason, 356, 361, Story, J., said. "In criminal cases courts of law are not at liberty to make intendments and inferences to support indictments, in the same manner as they may do to support civil actions." See also Ike v. S., 23 Missis. 525; S. v. Seiberling, 143 Mo. Ap. 318, 321, 127 S. W. 106.

55. Ante, § 319 (3).

56. Ante, § 13.

57. Rex v. Marsden, 4 M. & S. 164, 168.

58. S. v. Pearce, Peck, 66; McKinney v. P., 2 Gilman, 540, 43 Am. D. 65.

59. Cain v. S., 18 Tex. 387; S. v. Callendine, 8 Iowa, 288; S. v. Longstreth (N. D.), 121 N. W. 1114.

60. Finch v. S., 64 Missis. 461, 462; U. S. v. Ford, 34 Fed. Rep. 26; Miller v. S., 79 Ind. 98; Reg. v. Norton, 16 Cox C. C. 59; P. v. Minnock, 52 Mich. 628, 18 N. W. 390; Parker v. S., 9 Tex. Ap. 351.

61. The language of the text, here as in most other places, is not copied from any one judicial

of the plaintiff, that is to convince the defendant; and so in indictments, etc." The third is certainty to "a certain intent in every particular;" as, "in estoppels."[64] Limiting ourselves to criminal pleading, the meaning is that the middle certainty, and no more, is required in the indictment; the extreme certainty, in dilatory pleas; and the lowest certainty suffices in both general and special pleas in bar, like former jeopardy, pardon, and not guilty, showing that there should be no prosecution for what is alleged against the party pleading.

§ 324. **Highest and Lowest contrasted.**—Reasonably, and by the rule just stated, one who answers a criminal charge by matter precluding inquiry into the merits, must resort to the highest certainty; that is, "in every particular." Not only must he stand in court technically erect, but, not to defeat the ends of justice, he must disclose how the defect may be cured on a new proceeding. Also, this extreme certainty is demanded in estoppels, because the law does not favor them. It is likewise said to be required in the plea of alien enemy, and for the same reason. When, on the other hand, a party puts his defence directly on the merits, and it is of a nature not odious in the law, he is properly in favor, even more than is the one who brings the accusation, in respect to the pleadings; he, therefore, is held only to the lowest certainty, namely, to a common intent.[65]

64. Co. Lit. 303a. Compare this passage with what is said in Long's Case, 5 Co. 119b, 120a, 121a.

65. The several propositions in this section are plainly sustained by the authorities, yet it would not be easy to cite, after each clause, a passage from an approved source upholding it in exact words. For example, there is nothing more "certain" to one familiar with the course of adjudication on the subject than that the extreme certainty is necessary in those defenses which go simply to defeat the particular action,—as, for instance, that it is brought in the wrong county,—but do not reach the merits; yet, after some searching, I have not met with a passage in precise words to this proposition, though I do not mean to say that such may not be found; unless, indeed, some language by our American Gould may be deemed, as I think it is, sufficiently to the point. Gould Pl. c. 3, § 51-59. Many of the best established rules

4. **Equivocal.**—If its meaning is equivocal,—as, if the allegation is that the defendant did one *or* the other of two criminal things,[70] or the language may equally well be construed to charge a civil wrong as a criminal one,[71]—it is insufficient. Moreover,—

5. **Direct and Positive—(Belief).**—It must be direct and positive; [72] as, if it states the facts as a mere legal conclusion from others alleged,[73] or as a "belief," [74] it will be inadequate.[75] And—

6. **Specific.**—It must be sufficiently specific,[76] and in detail to individualize the offence, transaction, and thing; rendering them *certain.* No formula of words can in a single sentence so present in outline this doctrine as to preclude

8 Hun, 302; Cearfoss v. S., 42 Md. 403; Rex v. Upton-on-Severn, 6 Car. & P. 133; Deckard v. S., 38 d. 186;; Harne v. S., 89 Md. 552; S. v. Philbrick, 31 Me. 401, 403; McElroy v. S., 14 Tex. Ap. 235; S. v. Smith, 11 Or. 205, 8 P. 343 And see P. v. Gates, 13 Wend. 311, 317; Stout v. Ter., 2 Okla. Cr. Ap. 500, 103 P. 375; S. v. Quinn, 56 Wash. 295, 105 P. 818; See Com. v. Bush, 131 Ky. 384, 115 S. W. 249; S. v. Miller, 68 W. Va. 38, 69 S. E. 865; S. v. Hall, 130 Mo. Ap. 174, 108 S. W. 1077; Countryman v. S. (Tex. 1908), 105 S. W. 181. And see generally; Williamson v. U. S., 207 U. S. 425, 28 S. Ct. 163; P. v. Schatz, 50 A. D. 544, 64 N. Y. S. 127, 15 N. Y. Cr. 38; Grantham v. S., 89 Ga. 121, 14 S. E. 892.

70. Post, § 585 et seq.; S. v. Green, 3, § 72, Heisk. 131; S. v. Woodward, 25 .t. 616.

71. P. v. Williams, 35 Cal. 671; S. v. Parker, 43 N. H. 83.

72. Post, §§ 508, 554 et seq.; Rex v. Moorehouse, Cald. 554, 4 Doug. 388; S. v. Powell, 28 Tex. 626; Thomas v. S., 12 Tex. Ap. 227; Prophit v. S., 12 Tex. Ap. 233; U. S. v. Johnson, 26 Ap. D. C. 136; Agar v. S. (Ind. 1911), 94 N. E. 819; S. v. Rodgers (Ind. 1910), 93 N. E. 223; Hewitt v. S. (Ind. 1908), 86 N. E. 63; S. v. MacDonald, 105 Minn. 251, 117 N. W. 482; Terre Haute B. Co. v. S., 169 Ind. 242, 82 N. E. 81; S. v. Eastern Coal Co. (R. I. 1908), 70 A. 1; Breeland v. S., 79 Miss. 572, 31 So. 104.

73. Fouts v. S., 8 Ohio St. 98; Drake v. S., 19 Ohio St. 211; C. v. Dean, 110 Mass. 64. And see Lasindo v. S., 12 Tex. Ap. 59; Brunaugh v. S., 173 Ind. 483, 90 N. E. 1019; Harkness v. S., 95 Miss. 506, 48 So. 294; Com. v. White, 33 Ky. L. 70, 109 S. W. 324; S. v. Keerl, 29 Mont. 508, 75 P. 362, 10 Am. St. 579.

74. Vannatta v. S., 31 Ind. 210; P. v. Heffron, 53 Mich. 527; Sothman v. S., 66 Neb. 302, 92 N. W. 303.

75. S. v. Dooly, 64 Mo. 146.

76. Ante, § 322 (2); French v. S., 64 Miss. 461.

states that this superlative certainty "requires the utmost fulness and particularity of statement, as well as the highest attainable accuracy and precision; leaving, on the one hand, nothing to be supplied by intendment or construction; and, on the other, no supposable special answer unobviated."[83] It is a rule, not of "construction" only, but also of "addition;" that is, it requires the pleader, not only to answer fully what is necessary to be answered, but also to anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat his plea.[84] For example,—

§ 328. **Known to Self.**—If, in this sourt of plea, one would defeat the proceedings by some fact known specially to himself, not only must he state it, but add what will enable his opponent to correct the error, as, explains the author last quoted,[85] "it is not sufficient for the defendant to allege in his plea that his name is not B." He must say what it is, and "that he was at the time of the writ purchased[86] known and called by" the name he states; subjoining "a traverse that he was known or called by the name of B,[87] thus excluding, by anticipation, every supposition which could justify the plaintiff in giving him the name of B."

III. *The Distinction of Law and Fact and its Consequences in Averment.*

§ 329. 1. **Law known—Facts not.**—With the partial exceptions of foreign laws,[88] private statutes,[89] and municipal by-laws,[90] the law is conclusively presumed to be

83. Co. Lit. 352b.

84. Evans v. King, Willes, 554; Lawes Pl. 55.

85. Gould Pl. p. 86, § 59.

86. Holman v. Walden, 1 Salk. 6; Bac. Abr. Pleas, &c. F. 3.

87. Evans v. King, Willes, 554, 1 Lill. Ent. 6; 2 Chit. Pl. 418; Hixon v. Bines, 3 T. R. 185; Roberts v. Moon, 5 T. R. 487; Com. Dig. Abatement, I, 11; Lawes Pl. 107; Dovaston v. Payne, 2 H. Bl. 527, 530.

88. 1 Bishop Mar. Div. & S., §§ 1066-1111.

89. Ib. § 1089; Stat. Crimes, § 396 et seq.

90. Stat. Crimes, § 405; 1 Bishop Mar. Div. & S., § 1090. Garland v. Denver, 11 Colo. 534,

§ 332. 1. **Outward Form and Legal Import.**—We may look at facts through the eyes of the law or through our own natural eyes. In the one case, the legal import of the facts appears; in the other, their outward form. As to which,—

2. **The Rule for the Indictment**—is that, subject perhaps to exceptions, it may set out the facts according to their legal import or their outward form, at the pleader's election.[97] Thus,—

3. **What One does through his Agent**—he does in matter of law himself. So that if James as the agent of Samuel pays money to Richard, the payment is in law from Samuel to Richard; and the pleader may if he chooses so allege it, not even mentioning the name of James.[98] Or, if a sale is made to one as agent for another, the indictment may charge it as made to the latter. Yet it may equally well set out the transaction according to its outward form, introducing the name of the agent; or, in the latter case, charge the sale as made to the agent.[99] So,—

4. **A written Instrument,**—introduced into a pleading, may, except where special reasons forbid, be described either by its legal effect or by its words.[1] In like manner,—

5. **Principals of First and Second Degrees,**—where, their wills combining, they act in one another's presence, so that what one does in fact the others do in law, may be charged in the same way. The pleader may state the outward fact, or aver that all did it, as he chooses.[2] And—

97. Rex v. Healey, 1 Moody, 1; Parrish v. Com. (N. D. 1909), 123 N. W. 329.

98. C. v. Bagley, 7 Pick. 279. See also S. v. Brown, 31 Me. 520.

99. S. v. Wentworth, 35 N. H. 442. And see C. v. Call, 21 Pick. 515.

1. U. S. v. Keen, 1 McLean, 429; Bennett v. S., 96 Ark. 101, 131 S. W. 213; S. v. Henderson, 135 Iowa, 499, 113 N. W. 328; U. S. v. Heinze, 161 Fed. 425. See post, §§ 559-562.

2. Vol. III, § 3; New Crim. Law, I, § 648; Reg. v. Tracy, 6 Mod. 30, 32; Brister v. S., 26 Ala. 107; C. v. Chapman, 11 Cush. 422; Reg. v. Tyler, 8 Car. & P. 616; Hamlin v. S., 48 Conn. 92; Kinnaird v. Com., 134 Ky. 575, 121 S. W. 489. If punishable alike no distinction need be made between them in the indictment. Lowe v. S., 125 Ga. 55, 53 S. E. 1038; Bradley v. S., 128 Ga. 20, 57 S. E. 237.

6. **An Accessory before the Fact,**—when made by statute a principal, may be charged as doing the thing directly, or through his principal, at the election of the pleader.[3] The rule is so under the common law, as to the absent instigator of a misdemeanor.[4] As to which,—

§ 333. 1. **Election of Methods.**—Practically an indictment may be objectionable while legally good.[5] Therefore the one or the other method is sometimes distinctly to be chosen; sometimes it is matter of indifference. Thus,—

2. **The Outward Form,**—in an indictment against a second-degree principal for murder, was by Powell, J., deemed "more prudent and safe;" because "otherwise it might be difficult to persuade *the lay gents* [who are the jurors], that procuring, inciting, commanding, etc., would make one a principal."[6] And this suggestion is pertinent to a variety of cases wherein the outward form is simple and distinct, and the legal import would be confusing to the jury. But—

§ 334. **The Legal Import**—is better for the majority of cases. Commonly it is the short way; and the liability to troublesome variances, and the like, diminishes as the indictment contracts. So also diminishes the manual work of drawing it. Moreover, if without discrimination the pleader sets down the outward forms of the facts instead of their legal effect, he may occasionally find his work inadequate; for there are bounds, not all perhaps distinct, to this right of choice. Thus,—

§ 335. **There are Technical Words,**—ordinarily employed in setting out some of the crimes, for which the common law is believed to have provided no substitutes.[7]

3. S. v. Pugsley, 75 Iowa, 742, 38 N. W. 498; Hronek v. P., 134 Ill. 139, 23 Am. St. 652, 24 N. E. 861; P. v. Bliven, 112 N. Y. 79, 8 Am. St. 701, 19 N. E. 638; S. v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; S. v. Phelps, 5 S. D. 480, 59 N. W. 471; S. v. Golden, 11 Wash. 422, 39 P. 646.

4. P. v. Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. 701; P. v. Nolan, 144 Cal. 75, 77 P. 774; Spies v. P., 122 Ill., 12 N. E. 865, 17 N. E. 898, 3 Am. St. 320; S. v. Hessian, 58 Iowa, 68, 12 N. W. 77.

5. Ante, § 28a; Rex v. Galloway, 1 Moody, 234.

6. Reg. v. Tracy, 6 Mod. 30, 32.

7. Rex v. Stevens, 5 East, 244.

Illustrations are, in murder, "malice aforethought" and "murder;"[8] in rape, "ravish;"[9] in the nuisance of scold, "common scold."[10] So the doctrine is generally stated; but its reason in most cases is that the offence is of statutory origin, and the rule for the indictment on a statute applies; namely, that for identification it must use the statutory term.[11] Thus, murder, as distinguished from manslaughter, is a crime under an old worn-out statute,[12] the leading words whereof are the three just mentioned; hence their necessity. And the like is true of rape.[13] Perhaps "common scold" may come from some other reason. Under modern statutes differing from the old ones, the use of the old words is not always essential.[14]

IV. *Some Collateral Things.*

§ 336. 1. **Following Precedents.**—While brevity is a cardinal element in the indictment,[15] practically it should not be sought at the expense of prudence; or, as said Pollock, C. B., by "making experiments to see with how small amount of legal averment an indictment can be sustained."[16] So that the judicious pleader will walk carefully in the path of precedents, and even in rare circumstances add averments which they do not require.[17] Still,—

8. See in the notes to Toomes v. Etherington, 1 Saund. (Wms. Ed.) 353c; P. v. Urias, 12 Cal. 325; Etheridge v. S., 141 Ala. 29, 37 So. 357; Com. v. Webster, 5 Cush. (Mass.) 295; S. v. Brown, 168 Mo. 449, 68 S. W. 568; S. v. Woodward, 191 Mo. 617, 90 S. W. 90; see, also, Lindsey v. S., 69 Ohio St. 215, 69 N. E. 126.

9. Gouglemann v. P., 3 Par. Cr. 15.

10. Rex v. Foxby, 6 Mod. 11.

11. Post, § 615-618.

12. Vol. III, § 498-500, 544-548; New Crim. Law, II, §§ 624-628.

13. New Crim. Law, II, §§ 1108-1115.

14. S. v. Robinson, 29 La. Ann. 364; P. v. McDonald, 9 Mich. 150; Tully v. C., 4 Met. 357; Caldwell v. S., 28 Tex. Ap. 566, 14 S. W. 122; "ravish" not in statutory rape of infant. Wilken v. Com., 104 Ky. 325, 20 Ky. L. 378, 47 S. W. 219; S. v. Hayes, 17 S. D. 128, 95 N. W. 296; Tway v. S., 7 Wyo. 74, 50 P. 188.

15. Dir. & F., §§ 10-24.

16. Reg. v. Webb, 1 Den. C. C. 338, 344; S. v. Williams, 36 Tex. 352; 1 Chit. Pl. 232.

17. Ante, §§ 25, 293.

2. **Useless Averments,**—which abundant decisions and obvious reasonings of the law show to be such,[18] especially phrases like "instigated by the devil," "in the peace of God," "with force and arms," and many others both more and less nonsensical, which swell our old books, should be cast aside forever. Besides which, the author in his various precedents in "Directions and Forms" has pointed out more averments than he has left approved which both the decisions cited, and the reasonings of the law of pleading stated, demonstrate to be useless; these the pleader who keeps up with the times will reject. And the consequence ought to be that the profession will learn how much better and even briefer are, in general, the pruned common law forms than those which codes have permitted as substitutes.

§ 337. 1. **Parchment or Paper.**—In England, the indictment is engrossed on parchment,[19] and so is a coroner's inquisition.[20] We use paper, though doubtless parchment would equally suffice.

2. **Ink or Pencil.**—Practically the indictment should be written with ink. But a lead pencil satisfies the law for various writings.[21] We have authority for saying that it is insufficient for what is to become, like an indictment, a public record.[22] And as the power to quash indictments is plenary, we may doubt whether any court would suffer one written wholly in pencil, and which anybody could readily efface, to abide on its files.[23] But where a prosecuting officer had in pencil added *s* to *promise* in the ink draft of an indictment for forgery, and in this form the grand jury had found it a true bill, the court sustained it, yet intimated that it would not tolerate a whole indictment in pencil.[24]

18. As, see post, §§ 501, 502. S. v. New, 76 N. E. 181, 165 Ind. 571, 76 N. E. 400.

19. 1 Chit. Crim. Law, 316; Archb. New Crim. Pro. 98.

20. Rex v. Beavers, 1 East P. C. 383. An indictment is not invalid because it consists of two papers pinned together. S. v. Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. 841.

21. Bishop Con., § 341.

22. Meserve v. Hicks, 4 Fost. N. H. 295.

23. Post, § 761 et seq.

24. May v. S., 14 Ohio, 461, 465, 45 Am. D. 548; Jones v. Com., 124 Ky. 26, 97 S. W. 1118.

§ 338. Legibility—Erasures—Interlineations—Quotation Marks.—The court, not the jury, decides what are the words of an indictment or other pleading.[25] If there is doubt, it may compare the parts [26] or accept the sensible rendering.[27] Bad handwriting is not objectionable if the court can read it,[28] otherwise if it cannot. Erasures and interlineations are not necessarily fatal; [29] nor is the omission of a caret or its wrong location, for the court will so read the interlineations as to make sense.[30] Quotation marks will not help out an otherwise insufficient averment.[31]

§ 339. 1. Stable.—"The substantial rules of pleading," said Lord Mansfield, "are founded in stronge sense, and in the soundest and closest logic; and so appear when well understood and explained; though by being misunderstood and misapplied, they are often made use of as instruments of chicane." [32] Therefore they merit the profoundest study of the profession. And—

2. **Statutes.**—enacted to change the common law rules, do not render unimportant a knowledge of the common law. For the substantials of common law pleading are indestructible.[33]

25. C. v. Davis, 11 Gray, 4, 8; C. v. Riggs. 14 Gray, 376, 77 Am. D. 333. And see C. v. Galligan, 113 Mass. 203; post, § 792, note.

26. Irvin v. S., 7 Tex. Ap. 109.

27. Williams v. S., 3 Heisk. 376. See post, § 510.

28. S. v. Morris, 43 Tex. 372.

29. Rex v. Davis, 7 Car. & P. 319; C. v. Fagan, 15 Gray, 194. Interlineations in an indictment will be presumed, in the absence of contrary indications, to have been made before it was indorsed by the foreman. French v. S., 12 Ind. 670, 671, 74 Am. D. 229.

30. S. v. Daniels, 44 N. H. 383.

31. C. v. Wright, 1 Cush. 46, 64. And see post, § 354. Printing "true bill" or writing it by a person other than the foreman of the grand jury is a compliance with a statute requiring him so to endorse the indictment where the foreman signs it. P. v. St. Clair, 244 Ill. 444, 91 N. E. 573.

32. Robinson v. Rayley, 1 Bur. 316, 319.

33. Ante, §§ 89-112; S. v. Reakey, 62 Mo. 40; Kersh v. S., 24 Ga. 191; S. v. Coulter, 46 Mo. 564; S. v. Eason, 70 N. C. 88; Dillon v. S., 9 Ind. 408, 411; C. v. Magowan, 1 Met. Ky. 368, 71 Am. D. 480.

CHAPTER XXIII.

HOW THE LANGUAGE OF THE INDICTMENT.

§ 340. 1. **Anciently Oral.**—All pleadings in early times were oral, and their substance was entered of record by the clerk of the court; so that they became in effect written. Some of them may be delivered orally still,[34] but practically only the pleas of guilty and not guilty are now of this sort. This chapter relates chiefly to the indictment, which must be in the written form.

2. **How Chapter divided.**—We shall consider, I. Whether the language must be English and what is such; II. Impurities and Inelegancies in the Language.

I. *Whether the Language must be English and what is such.*

§ 341. 1. **Norman-French**—was from the time of William the Conqueror to a later period the spoken language of the judicial tribunals; including, therefore, the oral pleadings. But—

2. **Latin**—was the language of the record, which was made by the clerk. It was not the classical Latin, but a corruption of it, sometimes called law Latin. Thereupon,—

3. **Statutory Change.**—By 36 Edw. 3, stat. 1, c. 15, "all pleas which shall be pleaded in any courts whatever" were required to "be pleaded, showed, defended, answered, debated, and judged in the English tongue;" yet "entered and enrolled in Latin." [35] By interpretation and necessary practice,—

34. Post, §§ 788-790, 848.

35. Some writers, including Blackstone, fell into the error that anterior to this statute even the records were in French. Actual inspection shows that they were in Latin. And see Tomlins Law Dict. tit. Pleading; 3 Bl. Com. 317 et

4. **Pleadings and Record.**—When the pleadings came to be tendered by the party, says Stephen, "they followed, in the language as well as in other respects, the style of the record, and were therefore drawn up in Latin."[36] The result is that at the time of the settlement of this country Latin was, in England, the language of the pleadings and of the record. Still,—

§ 342. **English with Us.**—It is believed that this use of Latin was never adopted as common law in any of our colonies; though, on this point, the author cannot cite authorities covering the entire ground. Kilty says, of Maryland, that "the proceedings, which were not very formal, were always in English."[37] In some of our States there are statutes expressly excluding all languages but the English, and such is clearly the general American law. Again,—

§ 343. 1. **Style of Writing in England—(Abbreviations, Figures).**—By 4 Geo. 2, c. 26, which took effect in 1733, pleadings, records, and various other things were directed to be written in a "common legible hand and character, . . . and not in any hand commonly called court hand, and in words at length and not abbreviated." And 6 Geo. 2, c. 14, § 5, added "and with the like way of writing or printing, and with the like manner of expressing numbers by figures, as have been heretofore or are now commonly used in the said courts respectively, and with such abbreviations as are now commonly used in the English Language," etc. But this did not abolish Latin.

2. **With Us,**—these statutes which by express words did not extend to the colonies, could serve only as helps to an understanding of the modern English decisions,[38] and possibly indirectly of our own.

seq.; 3 Co. Thom. Ed. Pref. xxxviii.; Dug. Org. (3d Ed.) 95, 96; Barrington Stat. (4th Ed.) 290; Stephen Pl. (4th Ed.) Ap. xxiv.; 2 Reeves Hist. Eng. Law, 449.

36. Stephen Pd. (4th Ed.) Ap. xxiv.

37. Kilty Rep. Stats. 249. See P. v. Ah Sum, 92 Cal. 648, 29 P. 680.

38. S. v. Reed, 35 Me. 489, 58 Am. D. 727; S. v. Hodgeden, 3 Vt. 481.

before the figures,[47] and the full *Anno Domini*,[48] also the words "in the year," not adding "of our Lord," obviously mean the Christian era, and they have severally been adjudged adequate.[49]

§ 347. 1. **English by Adoption.**—Our language is being constantly augmented by words from other languages, and what is foreign to-day may be English to-morrow. In New York, *alias* was held to be English.[50] So in Vermont was *Anno Domini*. Redfield, J., observed that most of our "adopted terms have changed their costume, while others have not. *Phenomenon* and *memorandum* are as strictly English as any terms of the most purely Saxon derivation. Others are not the less so because they still retain their foreign dress; for example, *pro tempore, sine die, nemine contradicente, bona fide, Anno Domini*; as well as *ennui, sang-froid, beaux, cap-a-pie, tete-a-tete*, and thousands of others, which are well understood by mere English readers."[51] Yet—

2. **The Mathematical Signs,**—such as ° ′ for degrees and minutes, have been adjudged inadequate as not being English.[52]

3. **For And,**—the character "&" suffices,[53] being in common and immemorial use. But it was deemed "the better practice in indictments is to write all the words in full."[54]

Connecticut. Rawson v. S., 19 Conn. 292. So also in Minnesota. S. v. Munch, 22 Minn. 67. And see post, § 389. Peters v. U. S., 36 C. C. A. 105, 94 Fed. 127; Com. v. Traylor, 20 Ky. L. R. 97, 45 S. W. 450; Wood v. S. (Tex. 1898), 51 S. W. 235.

47. S. v. Hodgeden, 3 Vt. 481; Brown v. S., 16 Tex. Ap. 245, 248.

48. S. v. Gilbert, 13 Vt. 647.

49. Hall v. S., 3 Kelly, 18, 22; Engleman v. S., 2 Ind. 91, 52 Am. D. 494. In England, both the year of our Lord and that of the sovereign's reign are employed in alleging dates; but, with us, the former only is used, therefore it suffices. C. v. Doran, 14 Gray, 37, 38, 39.

50. Kennedy v. P., 39 N. Y. 245.

51. S. v. Gilbert, 13 Vt. 647, 651; Rex v. Harris, 7 C. & P. 416, as to setting out instrument in foreign language. P. v. Ah Sum, 92 Cal. 648, 28 P. 680.

52. S. v. Jericho, 40 Vt. 121, 94 Am. D. 387.

53. Pickens v. S., 58 Ala. 364; S. v. McPherson, 114 Ia. 492, 87 N. W. 421.

54. Brown v. S., 16 Tex. Ap. 245, 248; Malton v. S., 29 Tex. Ap. 527, 16 S. W. 423.

defective rhetoric,[64] an error in the punctuation,[65] will severally not render the indictment insufficient. For example, it may be good though the word "two" is spelled "too,"[66] or "assault" is spelled "assalt,"[67] or "twelfth" is spelled "twefith," the *f* and *l* taking the places of each other.[68] Employing the wrong word, omitting a word, adding a useless one, or substituting one word for another, will be fatal or not according as it weakens or changes or not, the allegation to what in meaning is inadequate. This is the principle; possibly, in the application of it, the decisions are not absolutely harmonious.[69] A mere clerical error does not vitiate,[70] yet intendment cannot supply the omission to spell out, even incorrectly, an indispensable word.[71]

Pierce v. S., 75 Ind. 199; Peacock v. S., 174 Ind. 185, 91 N. E. 597; Neimann v. S. (Tex. Cr. App. 1903), 74 S. W. 558; Gardner v. S., 56 Tex. Cr. App. 594, 120 S. W. 895; Lewis v. S., 55 Tex. 167, 115 S. W. 577; Monroe v. S., 56 Tex. Cr. 344, 119 S. W. 1146; S. v. Clinkerbeard, 135 Mo. App. 189, 115 S. W. 1059; Bell v. S., 139 Ala. 124, 35 So. 1021; Gaither v. Com., 28 Ky. L. 1345, 91 S. W. 1124· S. v. Lucas, 147 Mo. 70, 47 S. W. 1067; S. v. Lu Sing, 34 Mont. 31, 85 P. 521; Smith v. Ter., 14 Okla. 162, 77 P. 187; Johns v. S., 88 Neb. 145, 129 N. W. 247; Blair v. S., 4 Okla. Cr. 359, 111 P. 1003.

64. Perdue v. C., 96 Pa. 311; Dawson v. S., 33 Tex. 491.

65. Ward v. S., 50 Ala. 120; Fuller v. S., 117 Ala. 200, 23 So. 73.

66. S. v. Hedge, 6 Ind. 330.

67. S. v. Crane, 4 Wis. 400.

68. S. v. Shepherd, 8 Ire. 195, 197.

69. S. v. Hub Earp, 41 Tex. 487; Koontz v. S., 41 Tex. 570; Shay v. P., 22 N. Y. 317, 4 Par. Cr. 353; Edmondson v. S., 41 Tex. 496; S. v. Daugherty, 30 Tex. 360; S. v. Whitney, 15 Vt. 298; Ewing v. S., 1 Tex. Ap. 362; S. v. Williamson, 43 Tex. 500; S. v. Rinehart, 75 N. C. 58; S. v. Caspary, 11 Rich. 356; S. v. Carter, Conference, 210; Anonymous, 2 Hayw. 140; Walter v. S., 105 Ind. 589, 5 N. E. 735; Dickson v. S., 62 Ga. 583; S. v. Burke, 108 N. C. 750, 12 S. E. 1000; Jones v. S., 25 Tex. Ap. 621, 8 Am. St. 449, 8 S. W. 801; S. v. Dunning, 83 Me. 178, 22 A. 109; Price v. S., 67 Ga. 723; P. v. Flores, 64 Cal. 426, 1 P. 498; Moore v. S., 7 Tex. Ap. 42; Phillips v. S., 35 Ark. 384; S. v. Edwards, 70 Mo. 480; Hutto v. S., 7 Tex. Ap. 44; Irvin v. S., 7 Tex. Ap. 109; Snow v. S., 6 Tex. Ap. 284; Heath v. S., 101 Ind. 512; Blackwell v. S., 30 Tex. Ap. 416; P. v. Fowler, 88 Cal. 136, 25 P. 1110; S. v. Turlington, 102 Mo. 642, 651, 15 S. W. 141; Krueger v. P., 141 Ill. App. 110, affirmed in 86 N. E. 617.

70. S. v. Shaw, 58 N. H. 74; post, § 357.

71. S. v. Chicago, etc. Ry., 63 Iowa, 508, 19 N. W. 299; P. v. St. Clair, 55 Cal. 524.

§ 358. **A Word used in a Novel Meaning,**—in a statute creating a crime, should doubtless, in most instances, be also in the indictment thereon.[82] Within which principle, when a statute made punishable the unlicensed vending of "intoxicating liquors," adding that "ale, porter, strong beer, lager beer, cider, and all wines" should, "as well as all distilled spirits," be deemed such, it was adjudged adequate, on a charge of so selling "intoxicating liquors," to prove a sale of "lager beer," and no evidence was admissible that it was not intoxicating.[83] Yet doubtless, under our constitutions, there is a limit to the power of legislation to change the meanings of language.[84]

§ 359. **In Conclusion,**—this chapter illustrates the practical nature of our legal procedure. The law in the allegations seeks the idea, not the ornament of style. In the old times, when the English language was unsettled, it employed a barbarous Latin for its records, that they might be permanent and exact; afterward, when the vernacular had grown till it could be trusted, it transferred its love to the latter, that it might be more helpful to the present, and the better transmit its image to posterity.

W. 746; Bennett v. S., 96 Ark. 101, 131 S. W. 213; Billings v. S., 107 Ind. 54, 6 N. E. 914, 7 N. E. 763; P. v. Duford, 66 Mich. 90, 33 N. W. 28.

82. Post, § 612, 618, 624, 628.

83. C. v. Anthes, 12 Gray, 29; C. v. Bubser, 14 Gray, 83.

84. Noles v. S., 24 Ala. 672; Bishop First Book, §§ 455, 456.

§ 361. **How Chapter divided.**—We shall consider this subject in the order of, I. An Historical Retrospect; II. The Modern Indictment as to the County or District in General; III. The Minuter Place; IV. Formalities in the Allegation of Place; V. Other Related Questions.

I. *An Historical Retrospect.*

§ 362. **In Early Times,**—as Reeves states, writing of the period of Edward I., the men of the "second inquest," or petit jurors, were sworn to speak the truth, much as witnesses are now, and "in cases of life and limb" they could proceed on their "knowledge only." So they were not suffered to hear evidence; and if they lacked the personal knowledge enabling them to agree, they were interrogated by the court, and other steps might be taken. If, after all, they were in doubt, they must find for the defendant.[86]

§ 363. **Jurors the Witnesses.**—To quote further from this author, these "jurors were considered as *witnesses;* . . . and, as they came from the vicinage where the fact was committed, none, it was thought, could be better able to perform the office than themselves. It was many years after this reign, and when the second (since called the *petty*) jury began to be considered rather as judges of the presumption raised by the finding of the presentors than as witnesses of the fact, that a kind of evidence used to be exhibited to them." [87]

§ 364. 1. **To obtain the Jury,**—the sheriff now and long afterward, was sent out with a *venire facias* from the court. But—

2. **Whence?**—As the jurors then sought were not the indifferent persons who constitute an ideal jury now, but

81 N. C. 540; Thalheim v. S., 38 Fla. 169, 20 So. 938; Strickland v. S., 171 Ind. 642, 87 N. E. 12; Shipman v. S., 5 Ga. App. 664, 63 S. E. 671; McKinnie v. S., 44 Fla. 143, 32 So. 786; S. v. Beeskove, 34 Mont. 41, 85 P. 376; Com. v. Tobin, 140 Ky. 261, 130 S. W. 1116; Eylar v. S., 37 Tex. Cr. 257, 39 S. W. 665; Mohan v. S., 42 Tex. Cr. 410, 42 S. W. 552; S. v. Perry, 117 Iowa, 463, 91 N. W. 765.

86. 2 Reeves Hist. Eng. Law, 269, 270.

87. 2 Reeves Hist. Eng. Law, 270, 271.

sages somewhat qualifying it, does not contain all that might interest us, but it is sufficient for the present purpose.

II. *The Modern Indictment as to the County or District in General.*

§ 368. **In England**—long after the reasons for requiring the venue to be laid as thus stated had ceased, down to 1825, the practice continued. In that year it was provided by 6 Geo. 4, c. 50 § 13, that the *venire facias* for jurors should not require them "to be returned from any hundred or hundreds, or from any particular venue within." Later, in 1851, 14 & 15 Vict., c. 100, § 23 dispensed with the statement of venue "in the body of any indictment, but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment;" except that matter of local description should be given in the body, and there was another not important exception.

§ 369. **The Effect of the Statute**—of 6 Geo. 4, c. 50, § 13, requiring the jurors to be drawn from the county at large, plainly in principle rendered unnecessary any allegation of the minor locality, except when demanded by some other reason; and such appears to have been the English interpretation. As observed by Williams, J.: "At a period when the jury came from the immediate neighborhood, it was necessary to allege a parish; but now that they come, not *de vicineto*, but *de corpore comitatus*, I cannot think it necessary." [93]

§ 370. **With Us**,—it is believed in all our States, the jurors are not summoned *de vicineto*, but *de corpore comitatus*, as at present in England. Hence, in reason, the question stands with us as it was put in England by the statute of 6 Geo. 4.[94] And in authority, though in a part of our

93. Reg. v. Gompertz, 9 Jur. 401, 14 Law J. M. C. 118. See 3 Burn Just. (28th Ed.) 419; Archb. Crim. Pl. (13th Lond. Ed.) 41; Ware v. Boydell, 3 M. & S. 148.

94. There are States in which something like the before-mentioned statute of 14 & 15 Vict. c. 100, § 23, has been adopted. See

States, not in others, it is the ordinary method for the pleader to name the town or city in connection with the county, it is believed that nowhere, in the absence of such special reason as is pointed out in our next sub-title, is anything more than the county required.[95] So,—

§ 371. Mistake in Minor Locality.—If the indictment sets out the minor locality when it need not, proof of the offence in any other within the county will be adequate;[96] as, where one town appears in the allegation and another in the evidence, both being in the county.[97] Yet if the setting out is by way of local description, there is a rule of evidence[98] which requires the place to be proved as laid;[99] thus, where, on an indictment for the arson of a house "situate and being" in the sixth ward of the city of New York, "known and distinguished" as of a number mentioned, the proof showed it to be in the fifth ward, the variance was held to be fatal.[1]

post, § 385; Wickham v. S., 7 Coldw. 525.

95. S. v. Cambron, 20 S. D. 282, 105 N. W. 241; Covy v. S., 4 Port. 186, 191; Wingard v. S., 13 Ga. 396; Studstill v. S., 7 Ga. 2; S. v. Warner, 4 Ind. 604; Dillon v. S., 9 Ind. 408; Barnes v. S., 5 Yerg. 186; S. v. Goode, 24 Mo. 361; S. v. Smith, 5 Harring. (Del.) 490; S. v. Lamon, 3 Hawks, 175; Haskins v. P., 16 N. Y. 344; Evarts v. S., 48 Ind. 422; S. v. Click, 2 Ala. 26; Steedman v. S., 11 Ohio, 82; S. v. Chamberlain, 6 Nev. 257, 260; S. v. Glasgow, Conference, 38, 51, 2 Am. D. 629; Dean v. S., Mart. & Yerg. 127; Sullivant v. S., 3 Eng. 400; S. v. Shaw, 35 Iowa, 575; P. v. Robinson, 17 Cal. 363; S. v. Watrous, 13 Iowa, 489; Corley v. S., 3 Tex. Ap. 412; S. v. Schreiber, 98 Ind. 184; Dohme v. S., 68 Ga. 339; S. v. S. A. L., 77 Wis. 467, 46 N. W. 498; Seacord v. P., 121 Ill. 623, 13 N. E. 194; Hamilton v. P., 24 Colo. 301, 51 P. 425; Sharp v. Ter. (Ariz. 1911), 114 P. 974. It is not necessary to negative the jurisdiction of the federal courts. S. v. Carlson, 39 Ore. 19, 27, 69 P. 1116; P. v. Collins, 105 Cal. 504, 39 P. 16.

96. Heikes v. C., 26 Pa. 513; Carlisle v. S., 32 Ind. 55, as to alleging a crime in two cities and districts. U. S. v. Marx, 122 Fed. 964, 965.

97. C. v. Tolliver, 8 Gray, 386, 69 Am. D. 252; C. v. Creed, 8 Gray, 387. See also S. v. Godfrey, 3 Fairf. 361; Rex v. Taylor, Holt, 534; C. v. Heffron, 102 Mass. 148, 150; S. v. Verden, 24 Iowa, 126.

98. Post, § 485.

99. S. v. Crogan, 8 Iowa, 523; Moore v. S., 12 Ohio St. 387.

1. P. v. Slater,, 5 Hill (N. Y.), 401. And see Lynch v. S., 89 Ala. 18, 7 So. 829.

III. *The Minuter Place.*

§ 372. 1. **Local Nature.**—It is sometimes said that cases of a "local nature"[2] are not within the rule of the last subtitle, but the minor locality must be alleged. Since every crime is in its nature local, the meaning of this can be only that the minor locality is required to be given where, differing from the county at large, it constitutes an element in the offence. Thus,—

2. **Less than County.**—If the crime can be perpetrated only in some place less than the whole county, such minor place must be stated.[3] It is so in common law burglary, which must be charged to have been committed in a dwelling-house, for it is not possible elsewhere.[4] And it is the same in various statutory offences in buildings and other like places.[5] Under a statute making it punishable to kill or abuse an animal "in an enclosure not surrounded by a lawful fence," it is inadequate simply to charge the place as "the field" of another; the statutory designation of it must be given.[6] In cases like these, something further also, identifying the offence, is commonly required;[7] as, in burglary, the ownership should be alleged.[8] But such minutiae as street, number, and the like are unimportant unless the other identifying matter is omitted.[9]

2. Archb. Crim. Pl. (13th Ed.) 41.

3. Seacord v. P., 121 Ill. 623, 13 N. E. 194; S. v. Weaver, 83 Ind. 542; Seifried v. Com., 101 Pa. St. 200.

4. Vol. III, § 135. Not necessary to locate the house. Hamilton v. P., 24 Colo. 301, 51 P. 425.

5. Holtzclaw v. S., 26 Tex. 682; McElreath v. S., 55 Ga. 562; Hagan v. S., 4 Kan. 89; Miller v. S., 3 Ohio St. 475; S. v. McLoon, 78 Me. 420, 6 A. 601; Ragan v. S., 67 Missis. 332, 7 So. 280. See C. v. Stowell, 9 Met. 569; S. v. Heldt, 41 Tex. 220; O'Keefe v. S., 24 Ohio St. 175; Werneke v. S., 49 Ind. 202; S. v. McLaughlin, 160 Mo. 33, 60 S. W. 1075.

6. S. v. Staton, 66 N. C. 640.

7. Ante, § 325; post, § 505 et seq.; Lamkin v. S., 42 Tex. 415.

8. Vol. III, § 137.

9. Olive v. C., 5 Bush, 376; Lamkin v. S., supra; Schwab v. P., 4 Hun, 520; S. v. Shaw, 35 Iowa, 575. See S. v. Verden, 24 Iowa, 126; C. v. Donovan, 16 Gray, 18; Hamilton v. P., 24 Colo. 301, 51 P. 425; S. v. Raymond, 80 Mo. App. 537 (keeping bawdy house); S. v. Spotted Hawk, 22 Mont. 33, 55 P. 1026 (U. S. reservation); S. v. Tully, 31 Mont. 365, 78 P. 760; S. v. Cambron, 20 S. D. 282,

essential description, other than the foregoing paragraphs have pointed out? Under some circumstances, the offence of nuisance may, as we have seen, be in the limited sense local,[16] yet it is not necessarily.[17]

§ 374. **Some Instances**—wherein it suffices to allege the county, without more, are for murder,[18] affray, [19] disturbing public worship,[20] gaming.[21]

§ 375. 1. **Less or more than County.**—If the jurisdiction of the tribunal extends over a part only of the county, it is not good to charge an offence simply as committed in the county. For proof of acts over which the court has no authority will sustain this allegation.[21a] And the indictment must always show a jurisdiction in the court.[22] It

(Del.) 490, the court observed: "Unless time or place enter into the crime itself, it is not material to state or prove it. The locality of a road enters into the charge of obstructing it." As where the place determines the criminality. Johnson v. S., 1 Ga. App. 195, 58 S. E. 265; P. v. Stedeker, 175 N. Y. 57, 67 N. E. 132.

16. See, yet with caution, such cases as C. v. Heffron, 102 Mass. 148; C. v. Bacon, 108 Mass. 26; C. v. Logan, 12 Gray, 136, 138; C. v. Crowther, 117 Mass. 116.

17. S. v. Shaw, 35 Iowa, 575; Miller, J., observing, "The indictment being against the defendant as an individual and not against the house, it was sufficient to charge the offense as committed within the county." P. 578.

18. Studstill v. S., 7 Ga. 2; Dillon v. S., 9 Ind. 408; S. v. Lamon, 3 Hawks, 175; S. v. Bowen, 16 Kan. 475.

19. S. v. Warner, 4 Ind. 604.

20. S. v. Smith, 5 Harring (Del.), 490.

21. Covy v. S., 4 Port. 186; Drummond v. The Republic, 2 Tex. 156; Parkhill v. S., 47 Fla. 88, 36 So. 170; S. v. Oswald, 59 Kan. 508, 53 P. 525. And see S. v. Goode, 24 Mo. 361.

21a. McBride v. S., 10 Humph. 615. So Chitty: "If the indictment be preferred to a jury returned only for a special division, or precinct, or part of a county,—as in Yorkshire and Lincolnshire, where there are different districts and distinct juries, and in the Cinque Ports at Dover (part of Kent),—it must be shown in the body of the indictment that the offense was not only committed in a parish and the county, but within the particular district." 1 Chit. Crim. Law, 197, referring to Thorney's Case, Cro. Jac. 276, 2 Hawk. P. C., c. 25, § 34, 2 Hale P. C. 166; Keilw. 89, etc. And see, as to our own law, C. v. Richards, 1 Va. Cas. 1; Taylor v. C., 2 Va. Cas. 94; P. v. Wong Wang, 92 Cal. 277, 28 P. 270.

22. Ante, § 360; S. v. Cotton, 4 Fost. N. H. 143.

"the court cannot know where it lies."[31] But an offence was held to be well laid in "Cambridge," not adding the county; "for Cambridge being mentioned in several acts of Parliament, the court must take notice of" them; therefore it will discern "that Cambridge is in the county of Cambridge."[32] This is the principle with us. In most of our States, the names of these minor localities, such as townships, cities, and the like, and the counties in which they are located, are parts of the public law;[33] and where they are, the allegation of the place, omitting the name of the county, carries with it that of the county.[34] If the place is not designated by public law, the other consequence follows. And, said Parsons, C. J., "when, from the terms of the location of a town or district by the act of incorporation we cannot conclude that the whole town or district lies in one county, then the indictment ought to describe the offence as committed, not only in such town, but also

For the reason see Com. v. Springfield, 7 Mass. 9, 12.

31. Rex v. Griepe, 1 Ld. Raym. 256, 258.

32. Rex v. Journeymen Tailors, 8 Mod. 10, 12.

33. S. v. Simpson, 91 Me. 83, 30 Atl. 287; Ross v. Reddick, 1 Scam. 73; S. v. Tootle, 2 Harring. (Del.) 541; Goodwin v. Appleton, 22 Me. 453; Wood v. P., 3 Thomp. & C. 506, 1 Hun, 381; Herrick v. Morrill, 37 Minn. 250, 5 Am. St. 841, 33 N. W. 849; Central Rld., etc. Co. v. Gamble, 77 Ga. 584, 3 S. E. 287; Overton v. S., 60 Ala. 73; French v. Barre, 58 Vt. 567, 5 A. 568; S. v. Reader, 60 Iowa, 527, 15 N. W. 423; Carson v. Dalton, 59 Tex. 500; Schilling v. Territory, 2 Wash. Ter. 283; P. v. Wood, 131 N. Y. 617, 30 N. E. 243; Rock Island v. Cuinely, 126 Ill. 408, 18 N. E. 753; Gulf, etc. Ry. v. S., 72 Tex. 404, 13 Am. St. 815, 10 S. W. 81. Contra, in Indiana, Bragg v. Rush, 34 Ind. 405. And see Latham v. S., 19 Tex. Ap. 305; Collins v. S., 3 Tex. Ap. 323, 30 Am. R. 142.

34. S. v. Powers, 25 Conn. 48; Vanderwerker v. P., 5 Wend. 530; P. v. Lafuente, 6 Cal. 202. City of Grand Rapids v. Williams, 112 Mich. 247, 70 N. W. 547, 36 L. R. A. 137, 67 Am. St. 396. It was stated by Chief Justice Parsons that the parishes in England "are not ascertained by public acts of Parliament;" but in Massachusetts, "county limits, and also the boundaries of our several towns, are prescribed by public statutes, of which we are bound judicially to take notice." C. v. Springfield, 7 Mass. 9, 12. And see S. v. Palmer, 4 Misso. 453. As to Tennessee, see Hite v. S., 9 Yerg. 357; Taylor v. S., 6 Humph. 285; Sanderlin v. S., 2 Humph. 315; Thompson v. S., 5 Humph. 138. Maine, S. v. Jackson, 39 Me. 291.

in the county where it is found. And in places unincorporated a similar certainty will be expected."[35]

2. **"At" or "In."**—The allegation that the criminal act was "at" or "in" the county is equally good.[36]

§ 379. 1. "Aforesaid"—"said."—It suffices to state the county in the margin, caption, or commencement, then charge that the wrongful thing was done "in the said county" or "county aforesaid."[37] So, where there are more counts than one, and the place is given in the first, its repetition may be avoided by a like reference in the subsequent ones.[37a] But—

35. C. v. Springfield, supra, p. 12. The very nice point was held in Massachusetts, that it is insufficient to lay in a complaint to a magistrate the offense as committed "at West Brookfield," instead of "at the town of West Brookfield," not mentioning the county; because, said the judge, "it does not appear in this complaint that West Brookfield . . . is either a town or a place within the county of Worcester." C. v. Barnard, 6 Gray, 488. See C. v. Quin, 5 Gray, 478; C. v. Cummings, 6 Gray, 487. "In Swamsboro, Ga." is good. Mason v. S., 1 Ga. App. 534, 58 S. E. 139.

36. Augustine v. S., 20 Tex. 450.

37. 1 Chit. Crim. Law, 194; Rex v. Kilderby, 1 Saund. (Wms. Ed.) 308 and note; Barnes v. S., 5 Yerg. 186; S. v. Wentworth, 37 N. H. 196; Hanrahan v. P., 91 Ill. 142; Strickland v. S., 7 Tex. Ap. 34; Thomas v. S., 71 Ga. 44; S. v. Hunn, 34 Ark. 321; S. v. S. A. L., 77 Wis. 467, 46 N. W. 498; S. v. Ames, 10 Misso. 743 (in the earlier case of McDonald v. S., 8 Misso. 283, and the still earlier of S. v. Cook, 1 Misso. 547, the contrary, where the county was named only in the margin, was distinctly held); S. v. Alsop, 4 Ind. 141; S. v. Shull, 3 Head, 42. See S. v. Conley, 39 Me. 78. So, where an indictment for forcible trespass had the name of the county in the margin, and it alleged that the dwelling-house on which was committed the trespass was "there situated and being," these words were held sufficiently to designate the county. S. v. Tolever, 5 Ire. 452. The word "there," where the county has been mentioned in the margin, will be understood as referring to it. S. v. Bell, 3 Ire. 506. See Kennedy v. C., 3 Bibb, 490. It will not sustain a motion in arrest of judgment for selling liquor contrary to the New Hampshire statute, that the indictment does not allege the county more directly than by describing the respondent as "of the city of Concord, in said county," and averring that the sale was made at said Concord,—that being a city within the county. S. v. Shaw, 35 N. H. 217. See S. v. Hopkins, 7 Blackf. 494.

37a. Noe v. P., 39 Ill. 96; Fisk v. S., 9 Neb. 62, 2 N. W. 381; Enson v. S., 58 Fla. 37, 50 So. 948; Bartley

2. **Antecedent uncertain.**—If two counties have been mentioned, whether in the body or margin of the indictment, the like reference by "aforesaid" or "there" will leave it uncertain which is meant, consequently will be insufficient.[38] Yet if one of the two counties has no existence, a fact of which the court will take judicial cognizance, the reference word will be applied only to the other, and the allegation will be adequate.[39]

§ 380. **Other Like Questions,**—originating in the carelessness of draughtsmen, not unfrequently present themselves. They are solved by comparing the words with the law,[40] under the rule that their meaning is to be sought without inquiring into their grammatical accuracy.[41]

§ 381. 1. **Not in County of Offence.**—If a statute permits an indictment in a county other than that of the offence, perhaps, as said in a preceding section,[42] it may be competent to charge the transaction as in that of the indictment, though in truth it was in the other county,—following the permission to state it after its legal import.[43] But the facts equally well may, and Chitty says they "should,

v. S., 53 Neb. 310, 73 N. W. 744; Collins v. Com., 141 Ky. 564, 133 S. W. 233; Malone v. Com., 141 Ky. 570, 133 S. W. 235; Bridges v. S., 103 Ga. 21, 29 S. E. 859; Eaves v. S., 113 Ga. 749, 39 S. E. 318; Wright v. S., 88 Md. 436, 41 A. 795; P. v. Turney, 124 Mich. 542, 83 N. W. 273; P. v. Hoffman, 142 Mich. 531, 105 N. W. 838; S. v. Burdett, 145 Mo. 674, 47 S. W. 796; Dunn v. S., 58 Neb. 807, 79 N. W. 719.

38. 2 Hale P. C. 180; Rex v. Kilderby, 1 Saund. (Wms. Ed.) 308 and note; Reg. v. Rhodes, 2 Ld. Raym. 886, 888; Cain v. S., 18 Tex. 391; Elnor's Case, Cro. Eliz. 184; Rex v. Moor Critchell, 2 East, 66; Reg. v. Gunn, 11 Mod. 66; S. v. McCracken, 20 Mo. 411; Bell v. C., 8 Grat. 600; Jane v. S., 3 Misso. 61. See also S. v. Beeskove, 34 Mont. 41, 85 P. 376.

39. Reeves v. S., 20 Ala. 33. And see P. v. Breese, 7 Cow. 429, 430; ante, § 378 (1).

40. For example, see and compare Rex v. Mathews, 5 T. R. 162; C. v. Cummings, 6 Gray, 487; Reg. v. Albert, 5 Q. B. 37, Dav. & M. 89; Reg. v. St. John, 9 Car. & P. 40; Reg. v. O'Connor, 5 Q. B. 16; Reg. v. Mitchell, 2 Q. B. 636; Graham v. S., 1 Pike, 171; S. v. Jackson, 39 Me. 291; S. v. Slocum, 8 Blackf. 315; Sanderlin v. S., 2 Humph. 315; Pickett v. U. S., 1 Idaho, n. s., 523.

41. Ante, §§ 354-358.

42. Ante, § 63 (2).

43. Ante, §§ 332-334.

State, it knows what counties are contiguous; this is of law, and we have seen [51] that law need not be averred.[52]

V. *Other Related Questions.*

§ 383. **Allegation of State.**—It is customary to write the name of the State in the margin, in connection with that of the county. But the former need not appear either there or in any other part of the indictment,[53] unless required by the terms of the constitution or a statute.[54]

§ 384. 1. **Proof of County.**—The evidence, equally with the allegation, must show the county of the offence.[55] And this is as well the doctrine in misdemeanors as in felonies.[56]

2. **Form of Proof.—Reasonable Doubt.**—As in other issues, the proof is not required to be delivered in the words

51. Ante, § 329.

52. Perhaps Reg. v. Jones, 2 Car. & K. 165, 1 Den. C. C. 101, proceeded in part on this principle. It holds it sufficient in an indictment at the assizes for a felony on the high seas, to allege that it was committed on the high seas, without adding within the jurisdiction of the admiralty.

53. S. v. Jordan, 12 Tex. 205; S. v. Lane, 4 Ire. 113; Mitchell v. S., 8 Yerg. 514; Kirk v. S., 6 Mo. 469; C. v. Quin, 5 Gray, 478; S. v. Wentworth, 37 N. H. 196; Evarts v. S., 48 Ind. 422; S. v. Walter, 14 Kan. 375; S. v. Schreiber, 98 Ind. 184; Long v. S., 56 Ind. 133; S. v. Lillard, 59 Iowa, 479, 13 N. W. 637; S. v. Simpson, 91 Me. 83, 86, 39 A. 287.

54. Saine v. S., 14 Tex. Ap. 144.

55. Ante, § 360; post, § 1355; Moody v. S., 7 Blackf. 424; Gordon v. S., 4 Mo. 375; S. v. Lamb, 28 Mo. 218; Henry v. S., 36 Ala. 268; Green v. S., 41 Ala. 419; Yates v. S. 10 Yerg. 549; Mitchum v. S., 11 Ga. 615; Brown v. S., 27 Ala. 47; Huffman v. S., 28 Ala. 48; Spaight v. S., 29 Ala. 32; Searcy v. S., 4 Tex. 450; Huggins v. S., 2 Tex. Ap. 421; Logan v. S., 2 Tex. Ap. 408; S. v. Byam, 54 Iowa, 409, 6 N. W. 594; Sedberry v. S., 14 Tex. Ap. 233; P. v. Aleck, 61 Cal. 137; Boston v. S., 5 Tex. Ap. 383, 32 Am. R. 575; S. v. Mills, 33 W. Va. 455, 10 S. E. 808; Chambers v. S., 85 Ga. 220, 11 S. E. 653; S. v. Young, 99 Mo. 284, 12 S. W. 642; S. v. Schuerman, 70 Mo. Ap. 518; Simpson v. City of Macon, 8 Ga. Ap. 535, 69 S. E. 1084; Williams v. S., 9 Ga. Ap. 169, 70 S. E. 891.

56. Snyder v. S., 5 Ind. 194. A new trial may be awarded for want of proper proof of the venue. Holeman v. S., 13 Ark. 105; Ewell v. S., 6 Yerg. 364; 27 Am. D. 480; Hoover v. S., 1 West Va. 336; Cawthorn v. S., 63 Ala. 157; Boston v. S., 5 Tex. Ap. 383, 32 Am. R. 575. A special verdict, to sustain a judgment, must find in what county the offense was committed. Rex v. Hazel, 1 Leach, 368.

5. **Where the Place of Arrest**—determines the jurisdiction, the warrant of arrest ought to be produced in evidence.[62] It was deemed in one of our national circuit courts, that ordinarily the government's case need not begin with proof of the defendant's apprehension in the district of the trial; and if the offence is shown to have been committed in a ship on a voyage to the place of trial, and he is there in custody, the jury may infer that he was thence first brought into the United States.[63]

6. **The Nationality of a Ship**—may be shown orally,—as, that she belongs to subjects of the country and sails under its flag,—without the production of the register.[64]

§ 385. 1. **Statutes dispensing with Allegation of Place.**—We have seen[65] that by a modern statute in England, a setting down of the county in the margin of the indictment is alone, as a general rule, a sufficient averment of the venue.[66] In some of our States there are enactments more or less like this one.[67] It is believed that none of them attempt directly to dispense with the proof of place;[68] but in some the provision is distinct that it need not be alleged, yet must be proved.[69] Still,—

245; Wilder v. S., 29 Ark. 293; P. v. Velarde, 59 Cal. 457; Boston v. S., 5 Tex. Ap. 383, 32 Am. R. 575; Sullivan v. P., 122 Ill. 385, 13 N. E. 248; P. v. Loui Tung, 90 Cal. 377, 27 P. 295; Stoddard v. Sloan, 65 Iowa, 680, 22 N. W. 924.

62. Rex v. Forsyth, 2 Leach, 826.

63. U. S. v. Mingo, 2 Curt. C. C. 1. And see U. S. v. Anderson, 17 Blatch. 238; U. S. v. Reyburn, 6 Pet. 352; U. S. v. Quincy, 6 Pet. 445.

64. Reg. v. Allen, 10 Cox C. C. 405.

65. Ante, § 368.

66. Ante, § 371.

67. S. v. Simon, 50 Mo. 370; S. v. Keel, 54 Mo. 182. And see Guy v. S., 1 Kan. 448; Foster v. S., 19 Ohio St. 415; Nichols v. P., 40 Ill. 395; Stephen v. C., 2 Leigh, 759; Com. v. Howard, 205 Mass. 128, 91 N. E. 397; Bartley v. S., 53 Neb. 310, 73 N. W. 744; S. v. Moore, 203 Mo. 624, 102 S. W. 537; Caldwell v. S., 146 Ala. 141, 41 So. 743; Com. v. Rogers, 181 Mass. 184, 63 N. E. 421; S. v. Brown, 159 Mo. 646, 60 S. W. 1064; S. v. McDonough (Mo. 1911), 134 S. W. 545; S. v. Peet, 80 Vt. 449, 68 A. 661.

68. Williams v. S., 3 Heisk. 37; Wickham v. S., 7 Coldw. 525; Noles v. S., 24 Ala. 672, 679.

69. Noles v. S., supra.

2. **As to Proof.**—In at least one of the States it is enacted that in all criminal prosecutions "it shall be deemed and taken as true that the offence was committed in the county in which, by the indictment, it is alleged to have taken place, unless the defendant shall deny the same by plea in abatement." So that the absence of such plea, rendered by the defendant under oath, is tantamount to proof of the allegation by the State.[70]

3. **Whether Constitutional.**—Some of the milder forms of this provision have with us been adjudged constitutional.[71] It is, at least, odd to direct by statute that a thing need not be alleged, but it shall be proved.[72] If the one can be dispensed with, why not the other? And since our constitutions forbid any conviction for crime without both allegation and proof, and since no man can be required to accuse himself, how can a statute dispense with proof of the jurisdictional part unless the defendant will deny it under oath? One may, at least, question the wisdom of crowding so hard against constitutional rights for the sake of saving, to prosecuting officers, the trouble of writing a word, or of proving what is indispensable to the constitution of the imputed crime.

70. S. v. Outerbridge, 82 N. C. 617, 622; S. v. Allen, 107 N. C. 805, 11 S. E. 1016. And see S. v. Tosney, 26 Minn. 262, 3 N. W. 345; P. v. Tonielli, 81 Cal. 275, 22 P. 678.

71. Noles v. S., supra; Thompson v. S., 25 Ala. 41; S. v. Quartermus, 3 Heisk. 65. See Mayes v. S., 3 Heisk. 430; Alexander v. S., 3 Heisk. 475; S. v. Chamberlain, 6 Nev. 257; Foster v. S., 19 Ohio St. 415.

72. And see the chapter commencing ante, § 77; S. v. Grable, 46 Mo. 350.

CHAPTER XXV.

THE ALLEGATION AND PROOF OF THE TIME OF THE OFFENSE.

Consult—the next chapter for repetitions of time and place.

§ 386. 1. **The Doctrine of this Chapter**—is, that except as statutes have modified the common law, the indictment must state in precise language the time of the offence, but in the absence of a special reason rendering it important, this allegation is mere form,[73] and the time proved need not be the same as laid.[74]

2. **Statutes,**—in many of the States, and in various terms, have considerably yet not quite uniformly modified this doctrine.

3. **How Chapter divided.**—We shall consider, I. The Doctrine in General; II. More Days than One in Fact or in Allegation; III. Time in Special Cases Material; IV. The Proofs of the Time; V. The Allegation of Time as to the Sufficiency of the Indictment; VI. The Videlicet.

I. *The Doctrine in General.*

§ 387. 1. **The Day and Year**—of the offence should be stated;[75] except in States where statutes have made the

73. Kenney v. S., 5 R. I. 385; S. v. Wister, 62 Mo. 592.

74. 1 Stark. Crim. Pl. (2d Ed.) 54; Turner v. P., 33 Mich. 363; S. v. Peters, 107 N. C. 876, 12 S. E. 74; S. v. Williams, 30 La. Ann. 842; C. v. Baldwin, 129 Mass. 481; Crass v. S., 30 Tex. Ap. 480, 17 S. W. 1096; S. v. Missouri, etc. Co., 219 Mo. 156, 117 S. W. 1173; S. v. Coss, 53 Ore. 462, 101 P. 193.

75. Rex v. Holland, 5 T. R. 607; Rex v. Mason, 2 Show. 126; Anonymous, Lofft, 228; Roberts v.

is no objection to alleging different days in distinct counts.[80] Still,—

§ 388. 1. **Surplusage.**—If one of the two days can be rejected as surplusage,[81] yet the other is sufficiently certain, the indictment may rest on it.[82] On this principle,—

2. **Defective Continuando.**—Where the pleader, intending to employ the *continuando*,[83] sets down a day certain and adds words insufficient as such, they will be rejected as surplusage,[84] and the indictment sustained as charging the offence on the single day.[85] Thus, the keeping of a common gaming-house may be, and be alleged as, committed continuously on more days than one;[86] then, if the indictment charges it as done on a day certain, and adds, what is inadequate as a *continuando*,[87] *et diversis aliis diebus et vicibus tam antea quam postea*, it will be good for the day particularized, though "more days might have been laid."[88] But, where two days have been in due form laid, though connected with an ill *continuando* which may be rejected, the foregoing explanations show that the indictment is bad.[89]

§ 389. **How set out the Day.**—The orderly and full method is, for example, "on the tenth day of June, in the year of our Lord one thousand eight hundred and eighty-

80. Post, § 421, 426; Hausenfluck v. C., 85 Va. 702.

81. Post, § 477 et seq.; Van Immons v. S., 29 Ohio Cir. Ct. 681.

82. Wells v. C., 12 Gray, 326, 328; Rex v. Gill, Russ. & Ry. 431.

83. C. v. Bradley, 2 Cush. 553. For the proper form see Dir. & F. § 83.

84. Dir. & F., § 82.

85. P. v. Adams, 17 Wend. 475; Cook v. S., 11 Ga. 53, 56 Am. D. 410; C. v. Pray, 13 Pick. 359; S. v. Woodman, 3 Hawks, 384; S. v. Jasper, 4 Dev. 323. See Nichols's Case, 7 Grat. 589; Burner v. C., 13 Grat. 778; S. v. Nichols, 58 N. H. 41.

86. See post, § 397.

87. Dir. & F., §§ 82, 83.

88. Rex v. Dixon, 10 Mod. 335, 337, 338. To the like effect, S. v. Munger, 15 Vt. 290; C. v. Bryden, 9 Met. 137.

Divers Days. As to rejecting the words "divers days," etc., as to surplusage, U. S. v. LaCoste, 2 Mason, 129, 140; Stratton v. C., 10 Met. 217; C. v. Gardner, 7 Gray, 494; Gallagher v. S., 26 Wis. 423; C. v. Foley, 99 Mass. 499; C. v. Blake, 12 Allen, 188; S. v. Temple, 38 Vt. 37; S. v. Brewington, 84 N. C. 783; Dansey v. S., 23 Fla. 316, 2 So. 692; South v. C., 79 Ky. 493; post, §§ 395-397.

89. S. v. Temple, 38 Vt. 37.

three."[90] We have seen something of what abridgements and variations of this expression are permissible.[91] Where the words were "on the third day of August, eighteen hundred and forty-three," without "year" or its equivalent, the North Carolina Court deemed that the omission would be fatal at the common law, but it was cured by the statute of 1811.[92] To charge that the offence was committed on a specified "day of September *now past*," was adjudged not sufficiently specific; for every September which has been, is now past.[93]

§ 390. 1. **"On or about"**—a day named is by the common law insufficient in allegation.[94] Yet in some of the States statutes justify this form.[95] And without statutory aid in Connecticut, it appears to be accepted by the courts.[96] Yet—

2. **Time is important,**—and some reasonable averment of it is generally necessary, even where loose forms like the above are permitted;[97] and there may be a not quite

90. Dir. & F., § 80.

91. Ante, §§ 344-346; Whitesides v. P., Breese, 4; S. v. Tuller, 34 Conn. 280.

92. S. v. Lane, 4 Ire. 113. And see S. v. Bartlett, 47 Me. 388; Broome v. Reg., 12 Q. B. 834.

93. C. v. Griffin, 3 Cush. 523. Where the words were "first March," instead of "first day of March," the court said this "might be suffered to pass." Simmons v. C., 1 Rawle, 142; Cecil v. Ter. (Okla. 1905), 82 P. 654 (day of month blank). See also Tatum v. Com., 22 Ky. L. 927, 59 S. W. 32; Com. v. Taylor Co., 19 Ky. L. 1334, 43 S. W. 399.

94. U. S. v. Crittenden, Hemp. 61, 25 Fed. Cas. 14,890a; S. v. O'Keefe, 41 Vt. 691; U. S. v. Winslow, 3 Saw. 337, 28 Fed. Cas. 16,742; Clark v. S., 34 Ind. 436; Ter. v. Armijo, 7 N. M. 571, 37 P. 1117.

95. Ante, § 387 (1); Cokely v. S., 4 Iowa, 477; P. v. Aro, 6 Cal. 207, 65 Am. D. 503; Hampton v. S., 8 Ind. 336; Hardebeck v. S., 10 Ind. 459; S. v. Hill, 35 Tex. 348; S. v. Elliot, 34 Tex. 148; S. v. McMickle, 34 Tex. 676; Farrell v. S., 45 Ind. 371; S. v. Harp, 31 Kan. 496; S. v. Findley, 77 Mo. 338; Hoerr v. S., 4 Tex. Ap. 75; Williamson v. S., 5 Tex. Ap. 485; S. v. Perry, 117 Ia. 463, 91 N. W. 765; P. v. Miller, 137 Cal. 642, 70 P. 735; S. v. Thompson, 10 Mont. 549, 27 P. 349; S. v. Williams, 13 Wash. 335, 43 P. 15; Rema v. S., 52 Neb. 375, 72 N. W. 474; Gustaverson v. S., 10 Wyo. 300, 68 P. 1006; P. v. Sheffield (Cal. 1908), 98 P. 67.

96. Rawson v. S., 19 Conn. 292; S. v. Fuller, 34 Conn. 280.

97. Bolton v. S., 5 Coldw. 650; King v. S., 3 Heisk. 148; S. v. Tandy, 41 Tex. 291. And see Jeffries v.

definable degree of absurdity, contradiction, or impossibility in the setting out of the time, not suffered by the courts even then.[98]

§ 391. **From the Whole Allegation,**—"if the day and year can be collected," the indictment, says Starkie,[99] will be good "though they be not expressly averred;[1] as, where the time of the caption of the indictment is stated,[2] and the offence is laid to have been committed *primo die post Pasch., ult.*[3] So an indictment laying the offence on the Thursday after the day of Pentecost, in such a year, is good.[4] So if it lay it to have been committed on the 10th of March *last,* if the year can be ascertained by the style of the sessions before which the indictment was taken."[5] A complaint to a magistrate charged the offence as "on the third day of June, instant." It had no other date: but the jurat, indorsed on it, was "Bristol, ss. Received and sworn to on the fourth day of June, a. d., 1855, before said court." Here, as the year when the complaint was made did not appear, but only when it was received and sworn to, there was nothing to which the words "the third day of June, instant," could refer, and the time was adjudged insufficiently alleged.[6]

II. *More Days than One in Fact or in Allegation.*

§ 392. 1. **Acts on Different Days.**—Some offences may or must consist of acts done on different days. Then the indictment may or must allege more days than one. Thus,—

S., 39 Ala. 655; S. v. Glennen (Miss. 1908), 47 So. 550; Terrell v. S., 165 Ind. 443, 75 N. E. 884.

98. Compare Murphy v. S., 106 Ind. 96, 55 Am. R. 722, 5 N. E. 767; Brewer v. S., 5 Tex. Ap. 248; Collins v. S., 5 Tex. Ap. 37; Hefner v. S., 16 Tex. Ap. 573; Blake v. S., 3 Tex. Ap. 149; Serpentine v. S., 1 How. (Miss.) 256. And see Dreyer v. P., 176 Ill. 590, 52 N. E. 272.

99. 1 Stark. Crim. Pl. (2d Ed.), 55.

1. Gill v. P., 5 Thomp. & C. 308, 310.

2. Ante, § 379; Jacobs v. C., 5 S. & R. 315.

3. Com. Dig. Indictment, G. 2; 2 Hawk. P. C. c. 25, § 78.

4. 7 H. 6, 39.

5. Lamb, b. 4, c. 5, f. 491; 2 Hawk. P. C., c. 25, § 78.

6. C. v. Hutton, 5 Gray, 89, 66 Am. D. 352. See C. v. Blake, 12 Allen, 188; ante, § 379.

2. **In Homicide,**—both the stroke and death must be averred,[7] and generally they are laid as on different days, for such is the more frequent fact. But while each is indispensable, it is good in law to charge both as of one day, whether in truth they so occurred or not.[8] Moreover, the death may have come from a series of blows on different days, then the indictment may state the time of their infliction either way.[9] Again,—

3. **In Rescue,**—says Chitty,[10] the indictment must show "the day and year both of the arrest and the rescue."[11] And these averments must be made distinct.[12]

§ 393. 1. **Continuing Offences.**—The foregoing offences, though admitting of being committed on different days, are not in their nature continuing like some others technically designated by this term. These are such as in their nature consist of acts in a series, so that though it is not impossible the whole series may transpire on one day, naturally and commonly they *continue* from day to day. Thus,—

2. **A Nuisance to a Way,**—though it may come and go in a single day, does not so ordinarily. And whatever be the fact of a particular nuisance of this sort, a man may be indicted for erecting or maintaining it on a day named, or on continuous days, at the election of the prosecutor. And he must employ the latter form if, the nuisance in fact remaining, he seeks a judgment for its abatement; since otherwise the court cannot render this special judgment.[13] The allegation of time in this form is called, or it is said to be with, a *continuando*.

7. 1 Chit. Crim. Law, 222.

8. Vol. III, §§ 530-533; S. v. Haney, 67 N. C. 467; S. v. Sides, 64 Mo. 383; post, § 397.

9. Vol. III, § 530; C. v. Stafford, 12 Cush. 619.

10. 1 Chit. Crim. Law, 222.

11. 2 Hawk. P. C., c. 25, § 77; Foxe's Case, 2 Dy. 164b. Contra, Rex v. Cramlington, 2 Bulst. 208.

12. Foxe's Case, 2 Dy. 164b; and see Rex v. Burridge, 3 P. Wms. 439, 484, 497; Rex v. Forsyth, Russ. & Ry. 274, 276.

13. Vol. III, § 866; New Crim. Law, I, § 1079 (1) and note; Rex v. Stead, 8 T. R. 142, in which case Lord Kenyon, C. J., observes, that "it was so stated in Rex v. Pappineau, 1 Stra. 686, et adhuc existit; and in such cases the judgment should be that the nuisance be abated." P. 144.

§ 394. 1. **Continuando defined.**—A *continuando* is an allegation, in any appropriate words, that an offence whereof a day of beginning is stated, is continuing, commonly to another day stated.

2. **Form.**—Any words carrying distinctly the idea suffice; as, on a day stated, "and thence continually until" another day specified.[14] Or it may be, after mentioning the day of beginning, "from the said day until the day of the taking of this inquisition;"[15] or, "from the said day to the day of the finding of this indictment."[16] Or, on such a day, "and for six months next preceding said day;"[17] or, on such day "and continually from thence until" another day named;[18] or, "on, etc., and continually afterwards until the day of the taking of this inquisition."[19] But—

§ 395. 1. **"On Divers Days," Etc.**—The allegation, on such a day "and on divers other days and times between that day and" some other, which was accepted in civil pleadings, and in them practically superseded the foregoing forms, is not a *continuando*,[20] though it is sometimes spoken of as such.[21] In principle, it is certain as to two days and uncertain as to the rest, therefore void for repugnance where the offence is of a nature not continuing,[22] and equally void for uncertainty where the continuance of it during the intermediate period is required. Still, there are so many cases in which this form has been suffered to pass,[23] and it is so often in the judicial thought confounded

14. Dir. & F., § 83.

15. 3 Chit. Crim. Law, 612. For the like form, see Rex v. Russell, 6 B. & C. 566.

16. C. v. Wood, 4 Gray, 11; C. v. Kendall, 12 Cush. 414; C. v. Kingman, 14 Gray, 85; C. v. Woods, 9 Gray, 131; C. v. Frates, 16 Gray, 236; C. v. Hagarman, 10 Anne, 401; C. v. Shea, 14 Gray, 386; Com. v. G. W. Taylor Co. (Ky. 1897), 43 S. W. 399.

17. C. v. Mitchell, 115 Mass. 141.

18. Reg. v. Chandler, Dears. 453, 454; Ashbrook v. C., 1 Bush, 139, 89 Am. D. 616.

19. Rex v. Brooks, Trem. P. C. 195.

20. 1 Saund. (Wms. Ed.), 24 note; Gould, Pl., c. 3, §§ 86-96.

21. Wells v. C., 12 Gray, 326.

22. Ante, §§ 387, 388.

23. 2 Hawk. P. C., c. 25, § 82; S. v. Cofren, 48 Me. 364; C. v. Dunn, 111 Mass. 426; C. v. Tower, 8 Met. 527; Stratton v. C., 10 Met.

with the *continuando,* that one can hardly say how the question is in authority.[24] The form is not to be commended.

2. **A better Form,**—which has been sustained, names a day and adds "and on each day from that time until the finding of this indictment;" there is nothing in this uncertain.[25] We have precedents in which the forms of both this section and the last are blended.[26]

§ 396. Between Two Days.—It is in principle inadequate to charge an offence as committed at some indefinite time between two specified days. And so the courts held in appeals, which were governed by the same rules as indictments.[27] For here there is not the necessary certainty in time.[28] And if the two days are as wide apart as the Statute of Limitations will permit, the allegation is equivalent to no setting down whatever of time. Yet Story, J., once sustained this form of averment;[29] and there is English authority for holding it adequate in convictions before magistrates.[30] But in the words of Starkie, "an information charging the defendant with having been guilty of divers extortions, during a specified time, was deemed to be insufficient on motion in arrest of judgment;[31] and the court

217; P. v. Gilkinson, 4 Par. Cr. 26; S. v. Brown, 14 N. D. 529, 531, 104 N. W. 1112; Com. v. Sheehan, 143 Mass. 468, 9 N. E. 839.

24. See ante, § 388 (2) and cases cited.

25. S. v. Allen, 32 Iowa, 248; S. v. Freeman, 27 Iowa, 333. As to a continuing conspiracy, U. S. v. Eccles, 181 Fed. 906.

26. Thus, in 3 Burn's Justice, (28th Ed.) 1104, that one on a day named, "and on divers other days and times, as well before as afterwards," committed a specified nuisance, "and the same nuisance so as aforesaid done, doth yet continue and suffer to remain."

27. 2 Inst. 318; 2 Hawk. P. C., c. 23, § 88. See, however, observations by Story, J., in U. S. v. Smith, 2 Mason, 143.

28. Ante, § 386 (1), 387 (3).

29. U. S. v. Smith, 2 Mason, 143. See Jeffries v. S., 39 Ala. 655.

30. 1 Stark. Crim. Pl. (2d Ed.), 55, 56, referring to Rex v. Chandler, 1 Ld. Raym. 581, and Reg. v. Simpson, 10 Mod. 248, 249, 341.

31. Referring to Rex v. Roberts, 4 Mod. 101, 3 Salk. 198, Comb. 193, Carth. 226, 1 Show. 389, Holt, 363. Starkie cites only Modern; the other references to the case are mine. The precise words of the information are nowhere given, but Carthew says it was laid in it "that Roberts, being the common ferry-

said it might as well be said an indictment for battery would be good, setting forth that the defendant beat so many of the king's subjects between such a day and such a day, as that the principal indictment was good."[32] Hawkins maintains the like doctrine;[33] and we have a case holding it ill to say "on sundry and divers days and times between" two specified days.[34]

§ 397. 1. **Charging One Day, More in Fact.**—Within previous explanations,[35] a wrong which in its nature may be committed either on one day or on more days, and which in fact is in the latter form, may at the pleader's election be charged as occurring on one day;[36] because, as we shall see,[37] the proof of a thing done on one day will sustain the allegation that it was on another. Thus,—

2. **Continuous Larceny.**—One who steals gas by inserting a pipe on the street side of the metre,[38] whereby a continuous asportation is carried on for years, may be convicted of all on an indictment charging the larceny as on a single day.[39] Or,—

man, between 7 Septembris, anno 2, and the day of exhibiting this information, injuste," etc.

32. 1 Stark. Crim. Pl. ut sup.

33. 2 Hawk. P. C., c. 25, § 82.

34. S. v. Beaton, 79 Me. 314, 9 A. 728. To the like effect is S. v. Jasper, 4 Dev. 323, 327.

35. Ante, § 392 (1, 2).

36. Says Starkie: "Where an offense is committed by the doing of several acts at separate times, they may be stated to have been done at the same time. Thus, in a prosecution under the Stat. 7 Geo. 3, c. 50, § 1, against secreting letters containing any bank-notes, etc., it appeared that a bank-note had been cut into two parts, that the parts had been sent in separate letters at different times, and secreted at different times by the prisoner. The indictment alleged that the defendant did secrete the said letters then and there containing the said bank-note. The prisoner was convicted, and the judges, upon a case reserved, were of opinion that the conviction was proper. Rex v. Moore, 2 Leach, 575. And in an indictment for high treason, where the overt act consists in levying war, it may be charged to have been committed in one day. Townly's Case, Foster, 7, 8." 1 Stark. Crim. Pl. (2d Ed.), 57. See also S. v. Moore, 11 Ire. 70; S. v. Ransell, 41 Conn. 433; Townley's Case, 18 How. St. Tr. 329, 348, 349, 1 Chit. Crim. Law, 225.

37. Post, §§ 400-402.

38. New Crim. Law, II, § 798.

39. Reg. v. Firth (Law Rep.), 1 C. C. 172, 11 Cox C. C. 234. And see Reg. v. Henwood, 11 Cox C. C. 526, 528. The rule is otherwise

much regarded;[49] and it is doubtful whether this old doctrine, uncertain in itself, and lacking judicial confirmation, could be safely relied upon in a modern case.[50]

III. *Time in Special Cases Material.*

§ 399. 1. **The Doctrine**—is, that whenever time is material, it must, to the extent of such materiality, be alleged correctly and proved as laid.[51] Thus,—

2. **Hour.**—It is generally of no legal consequence at what hour of the day or night a criminal act was done, so the indictment need state only the day.[52] "But," says Hale, "where the time of the day is material to ascertain the nature of the offence, it must be expressed in the indictment."[53] Again,—

3. **The Day of the Week**—is generally unimportant; in which case it need not be alleged. But where, as in Sunday offences, the wrong comes from the day of the doing, or is enhanced by it, the indictment in addition to the day of the month and year[54] must aver that it was, for example, Sunday,[55] and not merely state a day found to be such by the calendar.[56] Thereupon it will be good though the calendar shows that the day of the month alleged falls on some other day of the week.[57] And proof of a Sunday other than the particular one set down will satisfy the law.[58]

49. New Crim. Law, I, § 217 (3), 420, 421.

50. And see, as to charging neglect, C. v. Sheffield, 11 Cush. 178; P. v. Otto, 70 Cal. 523, 11 P. 675.

51. Post, § 401; Dacy v. S., 17 Ga. 439. And see S. v. Caverly, 51 N. H. 446; P. v. Williams, 1 Idaho, n. s., 85.

52. Ante, § 387 (1); Rex v. Clarke, 1 Bulst. 203.

53. 2 Hale P. C. 179. For a fuller statement of the doctrine, see Vol. III, §§ 131-134.

54. Lehritter v. S., 42 Ind. 383; Effinger v. S., 47 Ind. 235; S. v. Land, 42 Ind. 311.

55. Shepler v. S., 114 Ind. 194, 16 N. E. 521; Brown v. S., 16 Neb. 658, 21 N. W. 454; Robinson v. S., 38 Ark. 548. Contra, S. v. Bergfeldt, 41 Wash. 234, 83 P. 177.

56. Gilbert v. S., 81 Ind. 565.

57. Megowan v. C., 2 Met. Ky. 3; S. v. Drake, 64 N. C. 589; P. v. Ball, 42 Barb. 324, and cases in the next note; S. v. Bryson, 90 N. C. 747; Roy v. S., 91 Ind. 417; Hoover v. S., 56 Md. 584. Contra, Werner v. S., 51 Ga. 426.

58. S. v Eskridge, 1 Swan, Tenn. 413; Frasier v. S., 5 Misso.

several misdemeanors are charged as of one date, the evidence may show them to have been committed on different days.[62] And even a treason has been proved as transpiring ten years anterior to the time laid in the indictment.[63] Still, for some practical reason,—as, relating to the compelling of an election, to avoid an application for continuance on the ground of surprise, and some others,—it will be in particular circumstances advisable for the prosecuting officer to give timely notice to the defendant, if he intends to prove a day other than that alleged.[64]

2. **How much Proof.**—As there must be an allegation of time,[65] so in some form there must be proof thereof.[66] It need not be specific to a particular day;[67] but it must satisfy the jury, beyond a reasonable doubt, that the offence was committed at some time within the period of limitations, and before the indictment was found.[68] Still,—

§ 401. 1. **Limits of Doctrine.**—As already shown,[69] in those exceptional instances in which the law has made a particularized day or hour an element in the offence, it must not only be alleged, but nearly enough proved as laid

101 P. 193; S. v. Hoben, 36 Utah, 186, 102 P. 1000; S. v. Willett, 78 Vt. 157, 62 A. 48.

62. Rex v. Levy, 2 Stark. 458.

63. Vane's Case, J. Kel. 16.

64. S. v. Nagle, 14 R. I. 331.

65. Ante, § 390 (2).

66. Stichtd v. S., 25 Tex. Ap. 420, 8 S. W. 477.

67. Chapman v. S., 18 Ga. 786; C. v. Dacey, 107 Mass. 206; C. v. Irwin, 107 Mass. 401; C. v. Carroll, 15 Gray, 409; U. S. v. Francis, 144 Fed. 520, modified in 152 Fed. 155, 81 C. C. A. 407; Bryant v. S., 97 Ga. 103, 25 S. E. 450; S. v. Gill, 63 Kan. 382, 65 P. 682; P. v. Allen, 144 Cal. 298, 77 P. 948; Whatley v. S., 46 Fla. 145, 35 So. 80; S. v. Bates, 182 Mo. 70, 81 S. W. 408; S. v. Rogers, 31 Mont. 1, 77 P. 293; S. v. Eggleston, 45 Ore. 346, 77 P. 738.

68. Armistead v. S., 43 Ala. 340; Chapman v. S., 18 Ga. 786; S. v. Carpenter, 74 N. C. 230; S. v. Johnson, 69 Iowa, 623, 29 N. W. 754; Patton v. S., 80 Ga. 714, 6 S. E. 273; S. v. Reick, 43 Kan. 279, 23 P. 577; Chambers v. S., 85 Ga. 220, 11 S. E. 653; Cudd v. S., 28 Tex. Ap. 124, 12 S. W. 1010. See C. v. Dillane, 1 Gray, 483; Cripe v. S., 4 Ga. Ap. 832, 62 S. E. 567; S. v. Higgins, 121 Iowa, 19, 95 N. W. 244; S. v. Anderson, 140 Iowa, 445, 118 N. W. 772; S. v. Riggio, 124 La. 614, 50 So. 600; S. v. Gerber (Minn. 1910), 126 N. W. 82; S. v. Lee, 228 Mo. 480, 128 S. W. 987; S. v. Hoben, 36 Utah, 186, 102 P. 1000; P. v. Lewis, 132 App. Div. 256, 116 N. Y. S. 893; S. v. Cole (Del. 1910), 78 A. 1025.

69. Ante, § 399.

§ 402. 1. **Continuing Offence—(Massachusetts).**—Another exception to the general rule is established by numerous decisions in Massachusetts. It is that wherever a series of acts amounting to a practice or occupation constitutes the offence, whether alleged as continuing or as committed on a single day, time is of the essence of the charge, which will not be sustained by proof varying from it in any degree in date.[78] Thus, on an allegation that one in violation of a statute was "a common seller of wine, brandy, rum," etc., on a day and year mentioned, there can be no evidence of a selling at any other than the particular date.[79] It is needless to say that, at least, the latter proposition is contrary to what is held and practised elsewhere.[80] Further—

2. **As to Which.**—While by the general doctrine already shown,[81] resting equally in reason and the decisions, if a continuing offence is laid as committed on one day, in a case where such form is adequate, the proof of it may be by acts done on any number of other days, the authorities are strangely silent as to how it is when the time is stated as on two days and the period between. The Massachusetts courts permit proof of it on any or all of the days covered by the allegation;[82] and such, thus far, pretty plainly is the rule in the other States. But we have seen that proof of it before or after is not admissible in Massachusetts.[83]

78. C. v. Gardner, 7 Gray, 494; C. v. Adams, 4 Gray, 27, 28; C. v. Pray, 13 Pick. 359, 364; C. v. Briggs, 11 Met. 573; C. v. Elwell, 1 Gray, 463. And see Dansey v. S., 23 Fla. 316, 2 So. 692.

79. C. v. Elwell, supra; C. v. Gardner, 7 Gray, 494; C. v. Traverse, 11 Allen, 260.

80. Ante, § 397; U. S. v. Riley, 5 Blatch. 204.

81. Ante, § 397.

82. C. v. Mitchell, 115 Mass. 141; C. v. Connors, 116 Mass. 35; C. v. Shea, 14 Gray, 386; C. v. Wood, 4 Gray, 11; C. v. Armstrong, 7 Gray, 49.

83. I have searched to ascertain the source of the peculiar Massachusetts doctrine, but not with marked success. The first hint of it, which I can find, is in C. v. Pray, 13 Pick. 359, 364. This was an indictment for being a common seller of intoxicants without a license, on a day named and on divers days between that day and another specified. And Morton, J., not referring to any authorities, uttered the dictum that, "in this case, the time enters into the essence of the offense, and with entire certainty fixes the identity. The defendant can never again be punished for

And, in reason, if an offence consists of several or of continuous acts, done on separate days, and it is charged in a form in general accord with the fact, proof of other days may with the same propriety be admitted as where it is constituted by a single act on one day, and it is so laid. That such has always been the understanding of the profession explains, it is submitted, the barrenness of the books on the question. So obvious and complete was the similitude between the allegation of one day and of more days than one, as to admitting proof of other days, that no lawyer out of Massachusetts ever deemed there could be a distinction, or such a possibility of it as to justify urging it upon the court.[85]

V. *The Allegation of Time as to the Sufficiency of the Indictment.*

§ 403. 1. **Assumed True.**—From the proposition that the indictment on its face must disclose a *prima facie* case against the defendant,[86] it results, among other consequences, that in considering whether or not it is sufficient, the court will assume the time to be as stated therein.[87] Hence, —

2. **Day subsequent.**—If it lays the offence on a day subsequent to the finding by the grand jury;[88] or,—

would enforce no restriction upon an indictment. The proof of one offense is all that would in any view be permissible.

85. And see Holbrook v. Knight, 67 Me. 244; S. v. Cushing, 11 R. I. 313; Fleming v. S., 28 Tex. Ap. 234, 12 S. W. 605.

86. Ante, § 325 (2), 326.

87. S. v. Norton, 45 Vt. 258; C. v. Maloney, 112 Mass. 283; C. v. Hitchings, 5 Gray, 482, 485; Strawn v. S., 14 Ark. 549; S. v. Bowling, 10 Humph. 52.

88. S. v. Litch, 33 Vt. 67; S. v. Noland, 29 Ind. 212; C. v. McKee, Addison, 33; C. v. Doyle, 110 Mass. 103; S. v. Davidson, 36 Tex. 325; S. v. Ingalls, 59 N. H. 88; Shoefercater v. S., 5 Tex. Ap. 207; Robles v. S., 5 Tex. Ap. 346; Williams v. S., 12 Tex. Ap. 226; S. v. Sexton, 3 Hawks, 184, 14 Am. D. 584. See Reg. v. Fenwick, 2 Car. & K. 915, 4 Cox C. C. 139; York v. S., 3 Tex. Ap. 15; Stevenson v. S., 5 Bax. 681; S. v. Crawford, 99 Mo. 74 (the defect cured by statute), 12 S. W. 354; S. v. Smith, 88 Ia. 178, 55 N. W. 198; Hall v. S. (Tex. 1897), 38 S. W. 886; McJunkins v. S. (Tex. 1897), 38 S. W. 994; Lee v.

5. **No Offence.**—An indictment is ill if, at the date of the averred act, it was not in law an offence.[94] Hence,—

§ 405. **Statutes of Limitations.**—On questions involving some differences of judicial opinion, if, assuming the offence to have been committed on the day alleged, it is prima facie barred by the Statute of Limitations, the indictment will be inadequate;[95] for no indictment is good unless, assuming its allegations to be true, it discloses *prima facie* a ground for inflicting the punishment of the law. *A fortiori,* this conclusion is correct where the statute is so general as to admit of no exception in the particular instance.[96] But by some opinions, if for aught that appears the case may be within some exception to the statute, though the allegation shows a *prima facie* bar, the indictment will be good.[97] And within any view of the foregoing propositions, it is permissible to lay the offence as beyond the period of limitations, and add an averment bringing it within some statutory ex-

94. See, and compare, post § 622; Bolton v. S., 5 Coldw. 650; S. v. Wise, 66 N. C. 120; S. v. Norton, 45 Vt. 258; Jeffries v. S., 39 Ala. 655; C. v. Maloney, 112 Mass. 283; Rex v. Treharne, 1 Moody, 298; S. v. Rollet, 6 Iowa, 535; Huber v. S., 25 Ind. 175.

95. McLane v. S., 4 Ga. 335; P. v. Miller, 12 Cal. 291; Hatwood v. S., 18 Ind. 492; Church v. P., 10 Bradw. 222; Lamkin v. P., 94 Ill. 501; S. v. Gibbs, 1 Root, 171; Bingham v. S., 2 Tex. Ap. 21; Garrison v. P., 87 Ill. 96; S. v. Noland, 29 Ind. 212; Shoefercater v. S., 5 Tex. Ap. 207; Noyes v. Crawley, 10 Ch. D. 31; S. v. Gill, 33 Ark. 129; S. v. Havey, 58 N. H. 377; P. v. Santvoord, 9 Cow. 655, 660; P. v. Ayhens, 85 Cal. 86, 24 P. 635. And see Molett v. S., 33 Ala. 408. Contra, Thompson v. S., 54 Miss. 740; S. v. McIntire, 58 Iowa, 572, 12 N. W. 593; S. v. Thrasher, 79 Me. 17, 7 A. 814; Boyce v. Christy, 47 Mo. 70.

96. Anthony v. S., 4 Humph. 83; S. v. Rust, 8 Blackf. 195; Shelton v. S., 1 Stew. & P. 208; S. v. Hobbs, 39 Me. 212; S. v. Caverly, 51 N. H. 446. But see Thompson v. S., 54 Missis. 740; U. S. v. Cook, 17 Wal. 168.

97. S. v. Hobbs, 39 Me. 212, 216; P. v. Santvoord, 9 Cow. 655, 660; Serpentine v. S., 1 How. Missi. 256, 260. See also Brock v. S., 22 Ga. 98; U. S. v. Smith, 4 Day, 121; S. v. Bowling, 10 Humph. 52; Clark v. S., 12 Ga. 350; P. v. Miller, 12 Cal. 291; Riggs v. S., 30 Missis. 635; U. S. v. Ballard, 3 McLean, 469; Johnson v. U. S., 3 McLean, 89; C. v. Ruffner, 28 Pa. 259; U. S. v. Cook, 17 Wal. 168; Thompson v. S., 54 Missis. 740.

ception.[98] By some, this course is specially approved.[99] Still, it has been deemed that though in the facts of the case there has been a *prima facie* bar, the pleader may so state the time as not to disclose it; then if on the trial such *prima facie* bar appears, the prosecuting State may prove that the defendant has been a fugitive from justice, or whatever else will show that he is within a statutory exception.[1]

VI. *The Videlicet.*

§ 406. 1. **Thus far**—we have assumed that the offence is not laid under what is called a *videlicet*, or *scilicet*.[2]

2. What it is.—It is a form of alleging time, place, and some other things, once much employed in pleadings, but less now, being attended with few practical advantages. Its object is to escape positive averments which must be proved, and avoid a variance.[3]

3. **The Doctrine of the Videlicet**—is sufficiently for our present purpose explained in Chitty's Criminal Law,[4] in a passage which, with his notes, and some others here originally appended, is as follows: "In setting forth the time when the facts occurred, as well as place, number, quantity, etc., it is very usual, in criminal as well as civil proceedings, to introduce the statement under what is termed a *videlicet*, or *scilicet;* as, 'that afterwards, to-wit, etc., at etc.,' the defendant did, etc., or a fact occurred which it is thought proper to mention. Lord Hobart, speaking of a *videlicet*, says [5] 'that its use is to particularize that which was before general, or to explain that which was before doubtful or obscure; that it must not be contrary to the premises, and

98. Ulmer v. S., 14 Ind. 52; S. v. Bryan, 19 La. Ann. 435; S. v. Bilbo, 19 La. Ann. 76; S. v. Peirce, 19 La. Ann. 90.

99. S. v. Meyers, 68 Mo. 266; Blackman v. C., 124 Pa. 578, 17 A. 194; Hollingsworth v. S., 7 Ga. App. 16, 65 S. E. 1077.

1. Blackman v. C., 124 Pa. 578, 17 A. 194.

2. See, for a full explanation of its use in pleading. Gould, Pl., c. 3, § 35-41.

3. Brown v. Berry, 47 Ill. 175.

4. 1 Chit. Crim. Law, 226, 227.

5. Stukeley v. Butler, Hob. 168, 172; Rex v. Stevens, 5 East, 244, 252. See also Knight v. Preston, 2 Wils. 332, 335.

neither increase nor diminish, but that it may work a restriction where the former words were not express and special, but so indifferent that they might receive such a restriction without apparent injury.'[6] Respecting the use of this mode of statement, it has been said that where the time when a fact happened is immaterial, and it might as well have happened at another day, there, if alleged under a *scilicet*, it is absolutely nugatory, and therefore not traversable; and if it be repugnant to the premises, it will not vitiate, but the *scilicet* itself will be rejected as superfluous and void;[7] but that where the precise time, etc., is material and enters into the substance of the description of the offence, there the time, etc., though laid under a *scilicet*, is conclusive and traversable,[8] and it will be intended to be the true time, and no other; and if impossible or repugnant to the premises, it will vitiate.[9] Either the allegation must

6. According to a Connecticut case, the effect of a videlicet, where general words are used before it and specific ones after, is to restrict the general to the specified things. Thus, where a complaint and warrant under the liquor law designated for seizure "certain intoxicating liquors; to wit, several casks of French brandy, containing twenty-five gallons, more or less; several casks of gin, containing twenty-five gallons, more or less; and several casks of intoxicating wines, containing twenty-five gallons, more or less;" this was held not to justify a seizing of any "intoxicating liquors" other than "French brandy," "gin," and "intoxicating wines;" in other words, the officer was a trespasser when he seized, under the warrant, rum, cider-brandy, and pale brandy. Mallett v. Stevenson, 26 Conn. 428. And see Sullivan v. S., 67 Missis. 346; Metcalfe v. Com., 27 Ky. L. R. 704, 86 S. W. 534.

7. S. v. Freeman, 8 Iowa, 428, 74 Am. D. 317; S. v. Haney, 1 Hawks, 460. And see McDade v. S., 20 Ala. 81; S. v. Murphy, 55 Vt. 547; Stevenson v. S., 5 Bax. 681.

8. In a complaint for misdemeanor, the defendant may traverse any material allegation, though made under a videlicet. S. v. Phinney, 32 Me. 439.

9. Bishop of Lincoln v. Wolferstan, 1 W. Bl. 490, 495; Dakin's Case, 2 Saund. 290b, 291, note; Skinner v. Andrews, 1 Saund. 168, 169; Hayman v. Rogers, 1 Stra. 232, 233; Knight v. Preston, 2 Wils. 332; Grimwood v. Barrit, 6 T. R. 460, 462; Bissex v. Bissex, 3 Bur. 1729, 1730; Pope v. Foster, 4 T. R. 590; Harris v. Hudson, 4 Esp. 152; Rex v. York, 5 T. R. 66, 71; Symmons v. Knox, 3 T. R. 65, 68; White v. Wilson, 2 B. & P. 116, 118; Rex v. Pollman, 2 Camp. 229, 231; Rex

CHAPTER XXVI.

REPETITIONS OF TIME AND PLACE IN THE INDICTMENT.

Consult—for the place, chapters beginning ante, §§ 45, 67a; for the allegation and proof of the place, and the same of the time, chapters beginning ante, §§ 360, 386.

§ 407. **The Doctrine of this Chapter**—is, that when an indictment has stated one time and one place, whether in one count or in more than one,[15] each repetition thereof may, and in just propriety should, be laid as occurring "then and there," [16] instead of by the longer form of the expression. When more than one time or place has been stated, rendering the antecedents of these words uncertain, the expression should be modified as the particular circumstances indicate.[17] So in any other case where "then and there" would be too vague, the duly-qualifying particulars should be added thereto.[18] More specifically,—

§ 408. **1. When Repeat.**—Commonly, says Chitty,[19] time and place should "not merely be mentioned at the beginning of the indictment, but be repeated to every issuable and triable fact." [20] They are not required to a mere con-

15. Post, § 431; S. v. Hertzog, 41 La. Ann. 775, 6 So. 622. But see S. v. Bruce, 26 W. Va. 153.

16. S. v. Hurley, 71 Me. 354; S. v. Stewart, 26 S. C. 125, 1 S. E. 468; S. v. Holden, 142 Mo. App. 502, 127 S. W. 399; Bobel v. P., 173 Ill. 19, 50 N. E. 322; Com. v. Manning, 164 Mass. 547, 42 N. E. 95; S. v. Ranken, 150 Ia. 101, 130 N. W. 732; Breyer v. P., 176 Ill. 590, 52 N. E. 272; S. v. Seiberling, 143 Mo. App. 318, 127 S. W. 106; Grier v. S., 81 Neb. 129, 115 N. W. 551; P. v. Turney, 124 Mich. 542, 83 N. W. 273; 7 Det. Leg. 320; P. v. Hoffman, 142 Mich. 431, 105 N. W. 838, 12 Det. Leg. N. 805; Vick v. S. (Tex. 1902), 69 S. W. 156; Palmer v. P., 138 Ill. 356, 28 N. E. 130; Davidson v. S., 135 Ind. 234; S. v. Blakiney, 33 S. Car. 111, 11 S. E. 637.

17. S. v. Day, 74 Me. 220.

18. And see, for the forms, Dir. & F., §§ 80-90.

19. 1 Chit. Crim. Law, 219-222.

20. Rex v. Holland, 5 T. R. 607, 620; Buckler's Case, 1 Dy. 69a; Com. Dig. Indictment, G. 2; Burn Just. Indictment; Williams Just. Indictment, IV.; Denison v. Richardson, 14 East, 291, 300, 301; S. v. La Bore, 26 Vt. 765; S. v. Bacon, 7 Vt. 219, 222; S. v. Kube, 20 Wis.

clusion from the facts;[21] and where, in an indictment for wounding, they are laid to the stroke, they need not be added to the wounding, its result.[22] Also, in many other cases, not reducible to a rule, the court will apply an allegation of time and place to subsequent averments, rendering repetition unnecessary.[23]

2. **"Then and There."**—It is the ordinary course to avoid, when circumstances permit, stating more than one time and place at the opening of the indictment; then, to prefix the words "then and there" to each subsequent averment of fact.[24] Thus,—

3. **In Robbery—Homicide.**—"In an indictment for robbery, these words must be connected with the stroke or the robbery, and not merely with the assault;[25] and in a case of murder, it is not sufficient to allege that the defendant on a certain day made an assault, and struck the party killed, but the words 'then and there' must be introduced before the averment of the stroke."[26]

§ 409. 1. **"Immediately"**—is not an adequate substitute for "then and there," being not sufficiently precise.[27] To illustrate,—

217, 91 Am. D. 390; S. v. Ross, 26 Mo. 260; Smith v. S., 36 Tex. Cr. App. 442, 37 S. W. 743.

21. S. v. Johnson, Walk. Missis. 392; Vol. II, §§ 549, 550.

22. S. v. Freeman, 21 Mo. 481; S. v. Bailey, 21 Mo. 484.

23. Post, § 413; C. v. Keyon, 1 Allen, 6; C. v. Doherty, 10 Cush. 52, 54; S. v. Dayton, 3 Zab. 49, 53 Am. D. 270; S. v. Cherry, 3 Murph. 7; Rex v. Napper, 1 Moody, 44; Rex v. Nicholson, 1 East P. C. 346; Harris v. S., 2 Tex. Ap. 102; S. v. Murphy, 35 La. Ann. 622; Turpin v. S., 80 Ind. 148; S. v. Willis, 78 Me. 70, 2 A. 848; S. v. Harris, 106 N. C. 682, 11 S. E. 377; S. v. Peet, 80 Vt. 449, 461, 68 A. 661.

24. 1 Chit. Crim. Law, 219, referring to 2 Hale P. C. 178; Rex v. Morris, 2 Stra. 901; Keilw. 100, 2 Hawk. P. C., c. 25, § 78, c. 23, § 88; Bac. Abr. Indictment, G. 4; Williams Just. Indictment, IV; Attorney-General v. Young, 2 Comyns, 423, 430; Fooshee v. S., 3 Okla. Cr. 666, 108 P. 554; S. v. Clark, 46 Ore. 140, 80 P. 101; Shaw v. U. S., 91 C. C. A. 208, 165 Fed. 174; Palmer v. P., 138 Ill. 356, 28 N. E. 130, 32 Am. St. 146; Davidson v. S., 135 Ind. 254, 34 N. E. 972; S. v. Blakincy, 33 S. C. 111, 11 S. E. 537.

25. Ib.; 2 Hale P. C. 178, 2 Hawk. P. C., c. 23, § 88; Wingfield's Case, Cro. Eliz. 739.

26. 2 Hale P. C. 178; Buckler's Case, 1 Dy. 69a, 2 Hawk. P. C., c. 23, § 88; Cro. C. C. 35.

27. S. v. Reakey, 1 Mo. Ap. 3; S. v. Sides, 64 Mo. 383.

2. **In Highway Robbery,**—a "special verdict found the forcible assault, and then in a distinct sentence that the prisoners 'then and there *immediately*' took up the prosecutor's money." This was adjudged inadequate; "because the word 'immediately' has great latitude, and is not of any determinate signification, and is frequently used to import 'as soon as it conveniently could be done.'"[28]

3. **"Instantly"**—has the infirmity of "immediately."[29]

§ 410. **"Being,"**—it is said, "will, unless necessarily connected with some other matter, relate to the time of the indictment rather than of the offense; and therefore an indictment for a forcible entry on land, *being* the prosecutor's freehold, without saying 'then being,' was held insufficient."[30]

§ 411. 1. **From the Formal Averments,**—it seems, "then and there" may be omitted, if they are attached to those of the gist of the charge. Thus,—

2. **In Homicide,**—"if," in the words of Chitty, "the indictment allege that the defendant feloniously and of malice aforethought made an assault, and with a certain sword, etc., 'then and there' struck, the previous omission will not be material."[31]

§ 412. **"Then and There," Full Repetition.**—Sometimes "then and there" must be used instead of repeating the time and place in full; as, if the offence consists of a series of connected acts, such as an assault attended by a spoiling of the clothes, "the repetition of the day and place is insufficient, because it does not appear that the acts were not

28. 1 Chit. Crim. Law, ut sup., referring to Rex v. Francis, Cas. temp. Hardw. 113, 114, 115, s. c., nom. Rex v. Frances, 2 Comyns, 478, 480; Rex v. Williams, 1 Leach, 529; Rex v. Borthwick, 1 Doug. 207, 212.

29. Lester v. S., 9 Misso. 666, 668.

30. 1 Chit. Crim. Law, ut sup., referring to Bac. Abr. Indictment, G. 1; Bridge's Case, Cro. Jac. 639; Rex v. Ward, 2 Ld. Raym. 1461, 1467, 1468, 2 Rol. 225; Com. Dig. Indictment, G. 2.

31. Heydon's Case, 4 Co. 41a, 41b; Buckler's Case, 1 Dy. 69a; Godb. 65, 66, 1 East P. C. 346; S. v. Rankin, 150 Ia. 701, 130 N. W. 732.

CHAPTER XXVII.

ASCERTAINING AND PARTICULARIZING THE CRIME.

Consult—New Crim. Law, I, §§ 607-625, 773-815a.

§ 415. **Necessary.**—It is impossible duly to frame an indictment without knowing what is the crime to be charged, and how it is defined and limited in the law. The pleader, therefore, must first ascertain the facts, secondly the law, and thirdly draw the indictment with reference to both. But—

§ 416. **The Name of the Crime**—is unimportant. Not all crimes have names.[43] Hence, though in some of the States the statutes regulating the indictment contemplate the naming of the crime in it,[44] such is not the practice under the common law; and even under these statutes, the omission of the name,[45] or giving of a wrong one,[46] will not render the indictment invalid.[47]

§ 417. 1. **In General of the Law's Crimes.**—In "New Criminal Law" and "Statutory Crimes," the several offences are defined and their limits stated. And we there see how transactions are cut up into specific offences. The learning of this subject must be understood by him who would properly construct an indictment. Now,—

43. New Crim. Law, I, §§ 599, 776; Hall v. S., 3 Kelly, 18.

44. S. v. Eno, 8 Minn. 220; S. v. Anderson, 3 Nev. 254.

45. S. v. Hessenkamp, 17 Iowa, 25; S. v. Baldy, 17 Iowa, 39; S. v. Anderson, supra; P. v. Phipps, 39 Cal. 326; Guest v. S., 19 Ark. 405; U. S. v. Wood, 44 Fed. 753.

46. C. v. Smith, 6 Bush, 263; S. v. Davis, 41 Iowa, 311; Watson v. S., 29 Ark. 299; S. v. Shaw, 35 Iowa, 575; U. S. v. Lehman, 39 Fed. 768; S. v. Jarvis, 18 Ore. 360, 23 P. 251; P. v. Miller, 128 N. Y. S. 549; S. v. Culbreath, 71 Ark. 80, 71 S. W. 254; S. v. Gillett, 92 Ia. 527, 61 N. W. 169; S. v. Munch, 22 Minn. 67; U. S. v. Elliott, 25 Fed. Cas. 15,044, 3 Mason, 156.

47. And see Wilson v. S., 25 Tex. 169; Camp v. S., 25 Ga. 689; S. v. Rigg, 10 Nev. 284; P. v. Cuddihi, 54 Cal. 53; Lyles v. S., 48 Tex. Cr. Ap. 119, 86 S. W. 763.

her opposition of will, and thirdly, the force and violence, charges rape. But it does not charge adultery, because it does not negative a marriage between the parties, or allege a marriage between the defendant and a third person; and on it, if all the elements of adultery are proved, yet not the force which makes the carnal act rape, there can be no conviction of rape because it is not proved, or of adultery because it is not alleged; nor, where the indictment for fornication must negative a marriage between the parties,[53] can there be a conviction for this offence. But an indictment for rape is not injured by an averment of the sort required in adultery and fornication;[54] consequently, in States where these are offences, the judicious pleader will insert the averment. And then, if all are felonies, or the State is one of those in which a defendant may be found guilty of misdemeanor on an indictment for felony, there may be a conviction for any one of the three offences proved.[55] Such is believed to be the just doctrine in principle, and it is sustained by a part of the authorities. But other authorities variously limit it, upon reasons which this is not the better place to consider. In connection with the particular offences, we shall to the extent deemed necessary look into this sort of question. Again,—

§ 420. 1. **Committed in Different Ways.**—If the crime is of the numerous class which may be committed in different ways,[56] the pleader should allege in his count as many of those ways as, being legally permissible, may seem also to be practically best. And—

2. **In Conclusion,**—he should so manipulate his whole case, and place in the indictment his facts in such relations to the law, that practically the best results will proceed from the trial.

53. Stat. Crimes, §§ 692, 693.

54. C. v. Squires, 97 Mass. 59.

55. C. v. Murphy, 2 Allen, 163; S. v. Sanders, 30 Iowa, 582. And see S. v. Vadnais, 21 Minn. 382; Williams v. S., 1 Tex. Ap. 90, 28 Am. R. 399.

56. Post, § 434 et seq.

of the court in each instance to interpose, when justice requires, by quashing a part or all, by compelling the prosecuting officer to elect on which ones he will ask for a verdict, or by whatever other step the special circumstances indicate.

3. **Count defined—Indictment.**—The word "count" is said to have been formerly, in civil actions, a synonym for "declaration." [61] Its later meaning ordinarily is one complete statement of a cause of action; whereof either one or more will constitute the declaration.[62] In criminal pleadings, an entire indictment seems never to have been called a count; at least, it is never now. The word is used where, in one finding by the grand jury, the essential parts of two or more separate indictments, for crimes apparently distinct, are combined; the allegations for each being termed a count, and the whole an indictment.[63]

§ 422. 1. **An Indictment in Several Counts,**—therefore, is a collection of separate bills [64] against the same defendant, for offences which on their face appear distinct, under one caption, and found and indorsed collectively as true by the grand jury.

2. **The Object of employing Separate Counts**—is twofold. In one class of cases, it is in fact, what the indictment shows on its face, to charge the defendant with distinct offences, which the court, if no reason appears to the contrary, will try together,[65] thus averting from both parties the burden of two or more trials. In the other class, it is to vary what is meant to be one accusation, so as, at the trial, to avoid an acquittal by reason of any unforeseen lack of harmony between allegation and proofs; or, if there is a legal doubt what form of charge the court will approve, so to shape the record that disaster will not come from un-

61. 3 Bl. Com. 293.

62. Gould Pl., c. 4, §§ 2, 3.

63. Watson v. P., 134 Ill. 374, 25 N. E. 567. And see U. S. v. Davenport, Deady, 264. "Court" defined. Boren v. S., 23 Tex. App. 28, 4 S. W. 463; P. v. Dougherty, 246 Ill. 458, 92 N. E. 929.

64. Ante, § 131.

65. Post, §§ 444-462.

expected rulings.[66] The former purpose will be explained in a subsequent chapter.[67] To illustrate the latter:—

§ 423. 1. **Burglary — Embezzlement — Larceny.** — As Chitty observes, where "circumstances render the evidence dubious," the pleader adds to a count for larceny in a dwelling-house one for feloniously breaking out. Or, to a count for embezzlement, he joins one for common law larceny. So an indictment for burglary may be augmented by counts for breaking and entering with the intent to steal, with the intent to commit murder, and various others, according to the circumstances.[68] Again,—

2. **In Larceny,**—the things stolen may in different counts be charged as belonging to different persons,[69] at least if the transactions were different.[70] So, to a count for larceny or burglary may ordinarily be added one for receiving, certainly if all is one transaction.[71] And—

3. **Different Methods**—by which an offence is committed may be alleged in distinct counts.[72] In like manner,—

66. 1 Chit. Crim. Law, 248 et seq.; Hitesman v. S., 48 Ind. 473; S. v. Bell, 27 Md. 675, 92 Am. D. 658; Smith v. C., 21 Grat. 809; Dill v. S., 1 Tex. Ap. 278; Griffith v. S., 36 Ind. 406; O'Brien v. Reg., 2 Cox C. C. 122; S. v. Harris, 106 N. C. 682, 11 N. E. 377; Adams v. S., 55 Ala. 143; Taylor v. P., 12 Hun, 212; Hall v. S., 8 Ga. App. 747, 70 S. E. 211; Crittenden v. S., 134 Ala. 145, 32 So. 273; S. v. Scott, 48 La. Ann. 293, 19 So. 141; Hathcock v. S., 889 A. 91, 13 S. E. 959.

67. Post, § 444 et seq.

68. 1 Chit. Crim. Law, ut sup. And see S. v. Hill, 1 Houst. Crim. 421; Robertson v. S., 6 Tex. Ap. 669; P. v. Piner, 11 Cal. Ap. 542, 105 P. 780; S. v. Carriere, 127 La. 1029, 54 So. 339; S. v. Lackey (Mo. 1910), 132 S. W. 602; Martinez v. S. (Tex. Cr. 1907), 103 S. W. 930.

69. Cooper v. S., 79 Ind. 206; Irving v. S., 8 Tex. Ap. 46; P. v. Besold, 154 Cal. 363, 97 P. 871; S. v. Larson, 85 Iowa, 659, 52 N. W. 509; S. v. Warren, 77 Md. 121, 26 A. 500, 39 Am. St. 401; Bushman v. Com., 138 Mass. 507; P. v. Johnson, 81 Mich. 573, 45 N. W. 1119; S. v. Mjelde, 29 Mont. 490, 75 P. 87.

70. New Crim. Law, II, § 888; Bushman v. C., 138 Mass. 507; C. v. Holmes, 137 Mass. 248.

71. Bennett v. P., 96 Ill. 602; S. v. Strickland, 10 S. C. 191; S. v. Lawrence, 81 N. C. 522; Andrews v. P., 117 Ill. 195, 7 N. E. 265; Goodman v. S., 141 Ind. 35, 39 N. E. 939.

72. Howard v. S., 34 Ark. 433; Shubert v. S., 20 Tex. Ap. 320; Beasley v. P., 89 Ill. 571; C. v. Andrews, 132 Mass. 263; S. v. O'Kane, 23 Kan. 244; Bridges v. S., 37 Ark. 224; P. v. Garcia, 58 Cal. 102; S. v. Norton, 28 S. C. 572, 6 S. E. 820;

4. **Different Grades**—of an offence may be joined in separate counts.[73]

§ 424. **No Joinder strictly Illegal.**—Since, in the criminal law, the pendency of one accusation against a man can never be pleaded in bar or abatement of another,[74] it follows that no piling of count upon count in the same indictment, or incongruous or other ill joinder of counts, is strictly illegal, so as to be demurrable, or subject the judgment to be arrested, or reversed on writ of error.[75] But—

§ 425. 1. **Judicial Discretion,**—not inflexible rule, regulates this question. Whenever the court, on seasonable application, deems that the due order of its proceedings, or the interests of a party, will be prejudiced by the multiplicity or ill joinder,[76] it will in its discretion quash a count or the whole indictment,[77] or order separate trials on the counts,[78] or compel the prosecutor to elect on which

Murray v. S., 25 Fla. 528, 6 So. 498. Under the New York Code, P. v. Rugg, 98 N. Y. 537; Grayson v. S., 92 Ark. 413, 123 S. W. 388; Toomer v. S., 112 Md. 285, 76 A. 118; Wait v. P., 46 Colo. 137, 104 P. 89; P. v. McLaughlin, 126 N. Y. S. 177.

73. Hawker v. P., 75 N. Y. 487; P. v. Sweeney, 55 Mich. 586; Templin v. S., 159 Ala. 128, 48 So. 1027; P. v. McDowell, 63 Mich. 229, 30 N. W. 68; Baldwin v. S., 12 Neb. 61, 10 N. W. 463; P. v. McCarthy, 110 N. Y. 309, 18 N. E. 128; Harris v. S., 1 Ga. App. 136, 57 S. E. 937.

74. New Crim. Law, I, § 1014.

75. Post, §§ 447-449 and note; 1 Stark. Crim. Pl. (2d Ed.), 39; Reg. v. Holman, Leigh & C. 177, 9 Cox C. C. 201; Jones v. S., 37 Ga. 51; Barnwell v. S., 1 Tex. Ap. 745; Teat v. S., 53 Miss. 439, 24 Am. R. 708; Janeway v. S., 1 Head, 130; Rex v. Jones, 2 Camp. 131, 132; P. v. Garnett, 29 Cal. 622; Miller v. S., 51 Ind. 405; Wall v. S., 51 Ind. 453; Wreidt v. S., 48 Ind. 579; Reg. v. Ferguson, Dears. 427, 6 Cox C. C. 454; Hamilton v. P., 29 Mich. 173; Hobbs v. S., 44 Tex. 353; Rex v. Kingston, 8 East, 41; U. S. v. Stetson, 3 Woodb. & M. 164; S. v. Nelson, 14 Rich. 169, 94 Am. D. 130; S. v. Brown, Winst. ii. 54; Henwood v. C., 52 Pa. 424; Ketchingman v. S., 6 Wis. 426; S. v. Kibby, 7 Misso. 317; P. v. Shotwell, 27 Cal. 394; S. v. Lockwood, 58 Vt. 378, 3 A. 539; S. v. Hamlin, 47 Conn. 95, 120; Miller v. S., 45 Ala. 24. But see Davis v. S., 57 Ga. 66; U. S. v. Heinze, 161 Fed. 425.

76. Hunter v. C., 79 Pa. 503, 21 Am. R. 83.

77. Post, § 758 et seq.; Rex v. Kingston, 8 East, 41, 46; Hamilton v. P., 29 Mich. 173; S. v. Freeman, 90 Miss. 315, 43 So. 289.

78. Reg. v. Barry, 4 Fost. & F. 389; S. v. Hazard, 2 R. I. 474, 60 Am. D. 96; C. v. Hills, 10 Cush. 530, 534; C. v. Burke, 16 Gray, 32. And

counts, will it therefore be reversed? These and various other questions, growing out of the union of fact and fiction in the doctrine and practice of separate counts, vex not a little the learning of our criminal-law procedure. They will not be answered here, but in their several appropriate places further on.

§ 429. Form of Count—(Commencement—Conclusion).—The orderly and full form is to put each count into one paragraph, having a separate commencement (not caption)[84] and conclusion, the same as though it constituted alone the indictment.[85] But in strict law the question of paragraphs is immaterial; and the court will determine, from the matter in the indictment, how much and what of it constitutes a count.[86] In practice, the commencement is generally abbreviated after the first count to read, "The jurors aforesaid, on their oath aforesaid, do further present." As a rule, any count from which the commencement is omitted, is, therefore, bad.[87] But in one case this defect in a count was held to be obviated by the fact that the record showed the grand jury to have been sworn in open court,[88]—a conclusion which appears to rest well on reasons to be shown in a subsequent chapter. The same doctrine applies to the concluding part of the several counts; the words "against the peace," etc., must be in each;[89] likewise, if the indictment is on a statute, the words "against the form of the statute."[90] It has been laid down in broad terms that "each count in an indictment must be sufficient in itself, and averments in one cannot aid defects in another."[91] But—

84. And see Davis v. S., 19 Ohio St. 270.

85. Ante, § 132 and note, 426; S. v. Banks, 84 S. Car. 543, 66 S. E. 999; Porter v. S., 48 Tex. Cr. Ap. 125, 86 S. W. 767; S. v. Nicholas, 124 Mo. Ap. 330, 101 S. W. 618.

86. S. v. Ruby, 68 Me. 543; S. v. Stacy, 103 Mo. 11; Pettes v. C., 126 Mass. 242.

87. S. v. McAllister, 26 Me. 374; S. v. Stacy, 103 Mo. 11; S. v. Dufour, 63 Ind. 567.

88. Huffman v. C., 6 Rand. 685.

89. S. v. Cadle, 19 Ark. 613. Contra, Bink v. S., 50 Tex. Cr. App. 445, 98 S. W. 863; Manovitch v. S. (Tex.), 96 S. W. 1.

90. Reg. v. Purchase, Car. & M. 617, 620; S. v. Soule, 20 Me. 19.

91. Worden, J. in S. v. Longley, 10 Ind. 482, 484; Keech v. S., 15

above the age of ten and under the age of twelve years."[1] So where a first count set out a larceny of goods of a stated value, and the second a receiving of the "goods aforesaid," the averment of value was adjudged not to be incorporated into the second.[2]

1. Reg. v. Martin, 9 Car. & P. 215.

2. S. v. Lyon, 17 Wis. 237. See Reg. v. Huntley, Bell, 238, 8 Cox C. C. 260.

I. *What is one Offence within our Present Doctrine.*

§ 433. 1. **Crime within Crime.**—Where crimes are included within one another, as explained in other connections,[6] a charge of a crime in its larger or largest form, comprehending however many smaller ones, is, in contemplation of our present rule, an accusation of only one offence, and the count is not double.[7] Thus,—

2. **Assault and Battery**—almost always appear together in allegation as one offence; the battery being the culmination of the assault.[8] And added aggravations of this dual wrong, even though such as, standing alone, constitute an offence of another name, do not render the count double.[9] So,—

3. **Assault, with a Deadly Weapon, with Intent to murder,**—contrary to a statute, is, within our present rule, but one offence, though the conviction may be for any one of what in another aspect are three offences.[10]

4. **In Murder**—we have another illustration; the indictment includes a manslaughter, a battery, and an assault, yet it is not multifarious.[11]

§ 434. 1. **Many Means.**—Some single offences are of a nature to be committed by many means, or in one or another of several varying ways. Thereupon a count is not double which charges as many means as the pleader

6. Ante, § 417 (2); New Crim. Law, I, §§ 780, 794-797. S. v. Heiden, 139 Wis. 519, 121 N. W. 138.

7. See cases in the following paragraphs; also C. v. Mills, 6 Bush, 296; P. v. De la Guerra, 31 Cal. 450; Mitchell v. S., 6 Ga. Ap. 554, 65 S. E. 326.

8. Vol. II, § 55.

9. Vol. III, § 63; P. v. Ah Own, 39 Cal. 604; S. v. Bradley, 34 Tex. 95; C. v. Squires, 97 Mass. 59; S. v. Dearborn, 54 Me. 442; P. v. Tyler, 35 Cal. 553; Dickinson v. S., 70 Ind. 247; Siebert v. S., 95 Ind. 471; Denman v. S., 15 Neb. 138, 17 N. W. 347; Warner v. S., 114 Ind. 137, 16 N. E. 189; S. v. Parker, 42 La. Ann. 972, 8 So. 473; S. v. Woods (Del. O. & T.), 77 A. 490; S. v. Lillie, 60 Wash. 200, 110 P. 801; Brundage v. S., 7 Ga. Ap. 726, 67 S. E. 1051; S. v. Mitchel, 20 Wash. 162, 54 P. 995.

10. P. v. Beam, 66 Cal. 394; Livingston v. S., 6 Ga. Ap. 208, 64 S. E. 709; S. v. Bednar, 18 N. D. 484, 121 N. W. 614; Brown v. S., 98 Miss. 786, 54 So. 305.

11. S. v. Huber, 8 Kan. 447; C. v. Harney, 10 Met. 422, 425.

doing one of the things.[19] Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction *and* where the statute has "or," and it will not be double, and it will be established at the trial by proof of any one of them.[20] Thus,—

2. **In Liquor-Selling,**—where the statute forbids the unlicensed sale of, for example, rum, brandy, whisky, or gin, the interpretation is that the offence may be committed by selling any one or two of the specified liquors, or all of them; and whichever is done in one transaction, there is but one crime. So the indictment charges the offence in whatever form the pleader elects; as, that the defendant sold rum, brandy, whiskey, *and* (not *or*) gin; or that he sold brandy, or that he sold rum and gin.[21]

Jennings, 1 Cox C. C. 115, 121; Laroe v. S., 30 Tex. Ap. 374, 17 S. W. 934; S. v. Jones, 106 Mo. 302, 17 S. W. 366.

19. Stat. Crimes, § 244.

20. Stat. Crimes, § 244; New Crim. Law, I, § 799; Reg. v. Jennings, 1 Cox C. C. 115, 121; S. v. Myers, 10 Iowa, 448; S. v. Cooster, 10 Iowa, 453; S. v. Harris, 11 Iowa, 414; S. v. Hastings, 53 N. H. 452; U. S. v. Bettilini, 1 Woods, 654; S. v. Brown, 8 Humph. 89; Hart v. S., 2 Tex. Ap. 39; McCarthy v. S., 56 Ind. 203; U. S. v. Sander, 6 McLean, 598; S. v. Murphy, 47 Mo. 274; Turnipseed v. S., 6 Ala. 664; S. v. Stout, 112 Ind. 245, 13 N. E. 715; S. v. Haskell, 76 Me. 399; S. v. Adam, 31 La. Ann. 717; Laroe v. S., 30 Tex. Ap. 374, 17 S. W. 934; Fahnestock v. S., 102 Ind. 156, 1 N. E. 372; U. S. v. Hull, 4 McCrary, 272, 14 Fed. 324; Bradley v. S., 20 Fla. 738; S. v. Richards, 33 La. Ann. 1294; Davis v. S., 100 Ind. 154; S. v. Gray, 29 Minn. 142, 12 N. W. 455; S. v. Stanley, 42 La. Ann. 978, 8 So. 469; P. v. Gosset, 93 Cal. 641, 29 P. 246. But see Miller v. S., 5 How. (Miss.) 250; post §§ 586-588; Blais v. S. (Ark. 1910), 126 S. W. 1064; Lepinsky v. S., 7 Ga. Ap. 285, 66 S. E. 965; Hauk v. S., 148 Ind. 238, 46 N. E. 127; S. v. Flynn, 76 N. J. 473, 478, 72 Atl. 296, 298; S. v. Pirkey, 22 S. D. 550, 118 N. W. 1042; Slover v. Ter., 5 Okla. 506, 49 P. 1009; Antonelli v. S., 3 Okla. Cr. Ap. 580, 107 P. 951; Taylor v. U. S., 6 Ind. T. 350, 98 S. W. 123; S. v. Yates (Iowa, 1910), 124 N. W. 174; S. v. Sullivan, 125 La. 560, 51 So. 588; P. v. Peck, 147 Mich. 84, 110 N. W. 495; S. v. Smith, 25 R. I. 513, 72 A. 710; Harris v. S., 58 Tex. Cr. Ap. 523, 126 S. W. 890; U. S. v. Franklin, 174 Fed. 161; Union Pac. R. Co. v. S., 88 Neb. 547, 130 N. W. 277; Ex parte Johnson (Cal. 1908), 93 P. 199; S. v. Des Moines Union R. Co., 137 Iowa, 570, 115 N. W. 232.

21. S. v. Whitted, 3 Ala. 102; Rawson v. S., 19 Conn. 292; C. v.

4. **Injuries inflicted on Two or More Persons,**—by another's single act, may be charged against the latter in a single count; for there is, or may be deemed to be, but one offence.[26] Thus,—

5. **A Battery or Murder**—of two or more persons may be alleged in one count.[27] We have some authority contrary to this,[28] but by reason and the better decisions, certainly if one bullet, or one blow, or one wrongful impluse of any kind, or probably if one transaction, results in the injury or death of two or more persons, all may be alleged in one count as one offence.[29] Where two, with intent to murder, commit a joint assault, the one with a knife and the other with a gun, they may be jointly held in one count.[30] And if a man shoots at two, meaning to kill one, but regardless which, a single count may contain the full accusation.[31] So, —

6. **A Libel**—on more persons than one may be averred in one count, without rendering it double, if the publication is a single act.[32]

§ 438. 1. **Many Acts,**—if together they constitute *but* one offence, may be laid in one count.[33] Thus,—

26. Reg. v. Giddings, Car. & M. 436. And see Wilcox v. S., 31 Tex. 586; U. S. v. Westman, 182 Fed. 1017.

27. Vol. II, § 60; Rex v. Benfield, 2 Bur. 980, 984; see 2 Stra. 870; 2 Ld. Raym. 1572, contra. In the case in Burrow, the question was pertinently asked, "Cannot the king call a man to account for a breach of the peace, because he broke two heads instead of one? How many informations have been for libels upon the king and his ministers?" As sustaining the text also, see Anonymous, Lofft, 271; Rucker v. S., 7 Tex. Ap. 549; Kannon v. S., 10 Lea, 386; S. v. Batson, 103 La. 479, 32 So. 478; Wilkinson v. S., 77 Miss. 705, 27 So. 639; Cornell v. S., 104 Wis. 527, 80 N. W. 745.

28. P. v. Alibez, 49 Cal. 452.

29. **Escape.** As to the escape of two prisoners on one day, see Oleson v. S., 20 Wis. 58.

30. Shaw v. S., 18 Ala. 547.

31. C. v. McLaughlin, 12 Cush. 615.

32. Rex v. Jenour, 7 Mod. 400; Rex v. Benfield, 2 Burr. 980.

33. S. v. Edmondson, 43 Tex. 162; P. v. Swaile, 12 Cal. Ap. 192, 107 P. 134; S. v. Sherman, 81 Kan. 874, 107 P. 33; S. v. Currier, 225 Mo. 642, 125 S. W. 461; P. v. Harrison, 14 Cal. Ap. 545, 112 P. 733; Com. v. Ellis, 207 Mass. 572, 93 N. E. 823; S. v. Dennison, 60 Neb. 192, 82 N. W. 628; Young v. S., 4 Ga. Ap. 827, 62 S. E. 558; U. S. v. Great Northern R. Co., 157 Fed. 291.

more offences, yet but one of them sufficiently, it is not double;[40] to be so, it must have complete averments of not less than two.[41]

§ 441. **Illustrations of Duplicity.**—Let us turn from considering what is not duplicity, to illustrate what is. Thus,—

1. **Way.**—Under a statute, overseers of roads were made punishable should they fail to keep a road in repair. A subsequent statute ordained a different punishment if they should omit to mile-mark it and at each mile set up post-marks. Thereupon a count was adjudged ill for duplicity which averred that the road was ruinous and out of repair, that it was not measured and mile-marked, and that no posts of durable wood were set up at each mile. For here each of two offences was duly charged.[42] Again,—

2. **Disturbing Meeting.**—It was by one section of a statute made punishable "if any person shall, on the Lord's Day, within the walls of any house of public worship, behave rudely or indecently;" by another section a different penalty was provided if any one, "either on the Lord's Day or at any other time, shall wilfully interrupt or disturb any assembly of people met for the public worship of God, within the place of their assembling or out of it." And it was adjudged double, as charging the derelictions of both sections, to aver that the defendant, within the walls of the public meeting-house which is used and improved as a house of public worship, did behave indecently and rudely, and did wilfully interrupt and disturb the people of, etc., as-

40. Post, § 480; Jillard v. C., 26 Pa. 169; S. v. Palmer, 35 Me. 9; S. v. Rollins, 55 N. H. 101; McKinney v. S., 25 Wis. 378; Thompson v. S., 30 Tex. 356; Henderson v. S., 2 Tex. Ap. 88; S. v. Coffey, 41 Tex. 46; S. v. Lawry, 4 Nev. 161; C. v. Frey, 50 Pa. 245; McTigue v. S., 4 Bax. 313; S. v. Smouse, 50 Iowa, 43; S. v. Lillie, 21 Kan. 728; Stewart v. S., 111 Ind. 554, 13 N. E. 59; Holden v. S., 18 Tex. Ap. 91; S. v. Knock, 142 Mo. 515, 44 S. W. 235.

41. C. v. Tuck, 20 Pick. 356, 360; Dawson v. P., 25 N. Y. 399; Burchard v. S., 2 Or. 78; C. v. Powell, 8 Bush, 7; Smith v. S., 85 Ind. 553; S. v. Harris, 106 N. C. 682; S. v. Taylor, 35 La. Ann. 835. See Boland v. P., 25 Hun, 423; Westfall v. S., 4 Ga. Ap. 834, 62 S. E. 558.

42. Greenlow v. S., 4 Humph. 25, 26.

§ 443. 1. **A Verdict**—convicting the defendant of one of the offences, and acquitting him of the other, cures the defect.[49] So,—

2. **A Nolle Prosequi**—of so much of the count as leaves a charge of but one offence makes it right.[50]

3. **After Verdict,**—if the defendant did not object before, it has been demonstrated that the duplicity did him no harm; and by being silent when, if ever, he must have felt the hurt, he has waived all right to complain. Such is the doctrine both of reason and of the better and more numerous, yet divided, authorities.[51] Still,—

4. **Arrest of Judgment.**—In some of the States, the motion in arrest of judgment, which is employed only after verdict, is held available;[52] and in others it has been re-

49. S. v. Miller, 24 Conn. 522; S. v. Merrill, 44 N. H. 624; S. v. Burns, 25 S. D. 364, 126 N. W. 572; S. v. Clement, 42 La. Ann. 583, 7 So. 685; Wash v. S., 22 Miss. 120; Aiken v. S., 41 Neb. 263, 59 N. W. 888; Connors v. U. S., 158 U. S. 408, 15 S. Ct. 951, 39 L. Ed. 1033; Durland v. U. S., 161 U. S. 306, 16 S. Ct. 508, 40 L. Ed. 709.

50. S. v. Buck, 59 Iowa, 382; C. v. Holmes, 119 Mass. 195; S. v. Merrill, 44 N. H. 624; post, §§ 1391, 1392, 1394, 1396.

51. S. v. Armstrong, 106 Mo. 395, 27 Am. St. 361, 16 S. W. 604; Lampkin v. S., 87 Ga. 516, 13 S. E. 523; Tucker v. S., 6 Tex. Ap. 251; Nash v. Reg. 9 Cox C. C. 424, 429, 4 B. & S. 935; Coney v. S., 2 Tex. Ap. 62; P. v. Burgess, 35 Cal. 115; P. v. Weaver, 47 Cal. 106; S. v. Holmes, 28 Conn. 230; S. v. Brown, 8 Humph. 89; P. v. Shotwell, 27 Cal. 394; Shafer v. S., 26 Ind. 191; Simons v. S., 25 Ind. 331; C. v. Tuck, 20 Pick. 356, 361. And see P. v. Clark, 33 Mich. 112, 120; P. v. Grinnell, 9 Cal. Ap. 238, 98 P. 681; P. v. Collins, 9 Cal. Ap. 622, 99 P. 1109; U. S. Board & Paper Co. v. S., 174 Ind. 460, 91 N. E. 955; S. v. Brown (Iowa, 1906), 109 N. W. 1011; S. v. Wilson, 121 N. C. 650, 28 S. E. 416; Morgan v. U. S., 78 C. C. A. 323, 148 Fed. 189; Lemon v. U. S., 90 C. C. A. 617, 164 Fed. 953; Hardesty v. U. S., 93 C. C. A. 417, 168 Fed. 25.

52. P. v. Wright, 9 Wend. 193; S. v. Merrill, 44 N. H. 624 (a case, however, in which this proposition is mere dictum, the facts not raising the question); S. v. Howe, 1 Rich. 260; overruling, in effect, S. v. Johnson, 3 Hill, S. C. 1, of which case the court seems not to have been aware. It cites, for English authority, Rex v. Roberts, Carth. 226; and Rex v. Clendon, 2 Stra. 870, the latter not being weakened on this point by being overruled as to its main matter in Rex v. Benfield, 2 Bur. 980, 984. I will suggest that these are brief cases, apparently not much considered, and

CHAPTER XXX.

JOINDER OF OFFENSES.

Consult—New Crim. Law, I, §§ 598-625. And compare with the last two and the next two chapters.

§ **444.** 1. **This Chapter,**—supplementing the last two, wherein are explained counts and their joinder, and how to frame a count so as to charge but one offence, shows what offences—in other words, what counts—may be practically introduced together into one indictment. We say practically; for it already appears [56] that there is no limit in strict law, the question being of judicial discretion.

2. **It is not Duplicity,**—which simply forbids the joinder of two or more offences in one count,[57] to charge them in separate counts.[58] So that here we are considering what combination of counts the judicial discretion will permit.

3. **Special Difficulties**—attend this chapter, not because of obscurities in the common law of England; but because that law as accepted in our different States was somewhat variant, and especially because subsequent legislation is still more divergent. So that the practitioner should at all points consult his own statutes and decisions in connection with this chapter.

4. **How Chapter divided.**—We shall consider, I. Joining Felony and Misdemeanor; II. The Joinder of Felonies; III. The Joinder of Misdemeanors.

56. Ante, § 424, 425.
57. Ante, § 432 (1, 2).
58. Reagan v. S., 28 Tex. Ap. 227, 19 Am. St. 833, 12 S. W. 601; C. v. Adams, 127 Mass. 15; S. v. Green, 37 La. An. 382.

on the trial, all the counts being substantially for the same offence."[64] Thus,—

3. **The Felony of Rape,**—and the misdemeanor of assault to commit it, may in separate counts be joined.[65]

§ 447. 1. **The Consequence**—of misjoining felony and misdemeanor is, it is believed, like any other misjoinder of counts, not to render the indictment bad in law, but to subject it to correction by the judicial discretion.[66] For example, judgment will not be arrested for this defect.[67] The right to demur seems to be conceded,[68] perhaps justly.[69] Of course,—

2. **Verdict.**—Under the common law rules,[70] the court will not permit a verdict to be taken, against the objection of the defendant, both for felony and for misdemeanor.[71]

§ 448. **Felony and Misdemeanor are distinguished**—further in this, that by the English doctrine, not changed in all our States, there can be no such joinder of felonies as includes separate transactions; while, by universal doctrine, they may be such joinder of misdemeanors, under some circumstances.[72] Let us look at these two propositions, with their limitations, a little in detail.

64. C. v. McLaughlin, 12 Cush. 612, 614; C. v. Carey, 103 Mass. 214. See S. v. Lincoln, supra. Hawthorne v. S. (Tex. Cr. Ap. 1911), 136 S. W. 776; S. v. Gruber 19 Idaho, 692, 115 P. 1.

65. S. v. Sutton, 4 Gill, 494; Vol. II, § 975. And see Burk v. S., 2 Har. & J. 426; S. v. Posey, 7 Rich. 484; P. v. Jailles, 146 Cal. 301, 79 P. 965. So may rape and incest. Wadkins v. S., 58 Tex. Cr. Ap. 110, 124 S. W. 959; S. v. Teris, 234 Mo. 276, 136 S. W. 339; P. v. Pia. 14 Cal. Ap. 131, 111 P. 105.

66. Ante, § 425 (1); C. v. Jacobs, 152 Mass. 276, 25 N. E. 463; C. v. Ryan, 152 Mass. 283, 25 N. E. 465; Reg. v. Ferguson, Dears. 427, 429, 6 Cox C. C. 454. To the like effect, U. S. v. Stetson, 3 Woodb. & M. 164; U. S. v. Bennett, 17 Blatch. 357. This would be so, even if the two offenses were charged in one count. Ante, § 443.

67. S. v. Nelson, 14 Rich. 169, 94 Am. D. 130. But see Stephen v. S., 11 Ga. 225.

68. Davis v. S., 57 Ga. 66; Stephen v. S., 11 Ga. 225; James v. S., 104 Ala. 20, 16 So. 94.

69. Ante, § 442 (3).

70. Ante, § 445 (1).

71. Reg. v. Jones, 8 Car. & P 776, 2 Moody, 94; Rex v. Gough, 1 Moody & R. 71.

72. Young v. Rex, 3 T. R. 98; C. v. Manson, 2 Ashm. 31; Kane v. P., 8 Wend. 203.

fences, however, which may not be everywhere felonies[79]) are often and properly joined.[80] So,—

7. **Larceny and Receiving.**—A single count may charge one person with a larceny of goods, and another with receiving them as an accessory after the fact.[81] But an indictment against one alone, if there is doubt whether he will be proved to be a receiver or a thief, charges him, in separate counts, with both.[82]

8. **How Object.**—Where felonies are joined contrary to these rules, or in a way to prejudice the defendant, he may, as already pointed out,[83] move the court to quash the indictment, or require the prosecutor to elect on which charge

79. New Crim. Law, II, § 609 (1).

80. Barnwell v. S., 1 Tex. Ap. 745; S. v. Nichols, 38 Iowa, 110; Hoskins v. S., 11 Ga. 92; P. v. McGlade, 139 Cal. 66, 72 P. 600. If relating to same instrument. Zachary v. S., 97 Ark. 176, 133 S. W. 811; P. v. Dougherty, 246 Ill. 458, 92 N. E. 929; Crawford v. S., 31 Tex. Cr. 54; P. v. Adler, 140 N. Y. 331.

Counterfeiting and having with intent. It was adjudged competent, in different counts, to charge a counterfeiting of coin, the having of five false pieces with the intent to pass them as true, and the having of less than five with such intent,—it not appearing that the counts related to different transactions. S. v. McPherson, 9 Iowa, 53. See, for other cases, Stephen v. S., 11 Ga. 225; U. S. v. Peterson, 1 Woodb. & M. 305; Joy v. S., 14 Ind. 139; McGregor v. S., 16 Ind. 9; P. v. McKinney, 10 Mich. 54.

81. Vol. III, §§ 5, 7, 8; Rex v. Hartall, 7 Car. & P. 475. See, as to California, P. v. Hawkins, 34 Cal. 181; Brown v. S., 88 Neb. 411, 129 N. W. 545; Com. v. Quinn, 42 Pa. Sup. Ct. 490; Chapple v. S. (Tenn. 1911), 135 S. W. 321; Lynch v. S., 95 Ark. 168, 128 S. W. 1053.

82. Rex v. Galloway, 1 Moody, 234, 236; Rex v. Madden, 1 Moody, 277; Reg. v. Huntley, Bell, 238, 8 Cox C. C. 260; S. v. Hazard, 2 R. I. 474, 60 Am. D. 96; S. v. Posey, 7 Rich. 484; O'Connell v. S., 55 Ga. 191; Owen v. S., 52 Ind. 379; Rex v. Flower, 3 Car. & P. 413; Maynard v. S., 14 Ind. 427; S. v. Stimpson, 45 Me. 608; Hampton v. S., 8 Humph. 69, 47 Am. D. 599; C. v. Adams, 7 Gray, 43; S. v. Daubert, 42 Mo. 242; S. v. Hogan, R. M. Charl. 474; S. v. Baker, 70 N. C. 530; S. v. Speight, 69 N. C. 72; S. v. Moultrie, 33 La. Ann. 1146; Johnson v. S., 61 Ga. 212. But see S. v. Johnson, 75 N. C. 123, 22 Am. R. 666. **Accessory Before and After.** Counts may be joined charging one with being accessory before the fact and after. Rex v. Blackson, 8 Car. & P. 43.

83. Ante, § 447.

2. **Verdict and Sentence.**—If, after a general finding of guilty on such an indictment, there is a sentence to a longer imprisonment than any one count would sustain, yet not longer than all, the judgment is not erroneous.[86] This is not the place to inquire whether it is or should be so in other States.[87]

§ 451. 1. **The Like Joinder**—of distinct transactions in felony seems to be permitted also in Tennessee,[88] and two or three of the other States, without statutory aid.[89]

2. **Statutes**—have directly or by their consequences greatly enlarged this right of joinder, or confirmed it, or restricted it, in various States.[90]

III. *The Joinder of Misdemeanors.*

§ 452. 1. **General.**—By the practice everywhere, distinct misdemeanors may be joined in separate counts of one indictment, to be followed by one trial for all, and by conviction for each, the same as though all were charged in separate indictments;[91] subject to practical limitations from judicial discretion. Thus,—

Mass. 507; Clark v. S., 5 Okla. Cr. Ap. 704, 115 P. 377. See Sarah v. S., 28 Miss. 267, 61 Am. D. 544.

86. Carlton v. C., 5 Met. 532.

87. And see post, §§ 457, 1327.

88. Cash v. S., 10 Humph. 111 (citing P. v. Rynders, 12 Wend. 425); Womack v. S., 7 Coldw. 508; Davis v. S., 85 Tenn. 522, 3 S. W. 348.

89. S. v. Tuller, 34 Conn. 280, 299. Adultery and fornication may be joined. Garland v. S., 104 S. W. 898, 51 Tex. Cr. 643.

90. The following cases may perhaps be serviceable under this sub-title; S. v. Blakesley, 43 Kan. 250, 23 P. 570; Hunter v. S., 11 Vroom, 495; Doyle v. S., 77 Ga. 513; C. v. Lewis, 140 Pa. 561, 21 A. 501; C. v. Shutte, 130 Pa. 272, 17 Am. St. 773, 18 A. 635; S. v. Scott, 15 S. C. 434; P. v. Aikin, 66 Mich. 460, 11 Am. St. 512, 33 N. W. 821; In re Lane, 135 U. S. 443, 10 S. Ct. 760; P. v. Sessions, 58 Mich. 594, 26 N. W. 291; Parker v. P., 97 Ill. 32; Watkins v. S., 37 Ark. 370; Mason v. S., 29 Tex. Ap. 24, 14 S. W. 71; S. v. Zimmerman, 47 Kan. 242, 27 P. 999; S. v. Elsham, 70 Iowa, 531, 31 N. W. 66; S. v. Pierre, 38 La. Ann. 91.

91. Ante, § 448; Kane v. P., 8 Wend. 203; C. v. McChord, 2 Dana, 242; Stone v. S., Spencer, 404; P. v. Costello, 1 Denio, 83; P. v. Gates, 13 Wend. 311; S. v. Kibby, 7 Mo. 317; U. S. v. O'Callahan, 6 McLean, 596; Orr v. S., 18 Ark. 540; Covy v. S., 4 Port. 186; S. v. Bitting, 13 Iowa, 600; S. v. Gummer,

otherwise,[99] as and if the judicial discretion indicates. Therefore widely the joinder will be thus restrained if the offences are of different natures, or especially if the punishments are not the same.[1] And sometimes the different natures of the offences, or protection to the accused, or convenience to the prosecutor will indicate separate trials on the respective counts. Still, in general, it can be no embarrassment that the punishments differ; for the sentence is, or may be, separate on each count.[2] Hence the joinder would seem not to be objectionable.[3] Plainly there can be no joinder where for the several offences there are different modes of trial.[4] If the varying counts comprehend only one transaction, their joinder, and one trial on all, are in no view objectionable; since the form of the verdict is under the control of the court.[5]

2. **Different Methods of Committing Offence.**—Let us return to the doctrine that where an offence may be committed by different means, a single count may charge all, and proof of any one will sustain the allegation.[6] The limit is that the means must not be repugnant.[7] Still, whether

99. Ante, § 425.

1. Norvell v. S., 50 Ala. 174, 178; S. v. Coleman, 5 Port. 32; U. S. v. Scott, 4 Bis. 29; Teat v. S., 53 Miss. 439, 24 Am. R. 708; Quinn v. S., 49 Ala. 353; Rex v. Kingston, 8 East, 41; Burt v. S., 159 Ala. 134, 48 So. 861.

2. Post, §§ 1326, 1327; Martin v. P., 76 Ill. 499; Mullinix v. P., 76 Ill. 211.

3. And see Rex v. Johnson, 3 M. & S. 540, 549; Butler v. S. (Tex. Cr. App. 1911), 134 S. W. 230.

4. Cawley v. S., 37 Ala. 152; S. v. Emmons, 45 Kan. 397, 26 P. 679; Benson v. Com., 158 Mass. 164, 33 N. E. 384.

5. Reg. v. Fussell, 3 Cox C. C. 291; Estes v. S., 55 Ga. 131; Baker v. S., 4 Pike, 56; Johnson v. S., 29 Ala. 62, 65 Am. D. 383; S. v. Hooker, 17 Vt. 658, 669. "There is no objection to stating the same offense, in different ways, in as many different counts of the indictment as you may think necessary, even though the judgment on the several counts be different,—Rex v. Galloway, 1 Moody, 234; see Rex v. Powell, 2 B. & Ad. 75,—provided all the counts be for felonies, or all for misdemeanors." Archb. New Crim. Pro. 93. And see Reg. v. Strange, 8 Car. & P. 172.

6. Ante, § 434. See Hitesman v. S., 48 Ind. 473; S. v. Nieuhaus, 217 Mo. 332, 117 S. W. 73.

7. Post, §§ 489-492; U. S. v. Pirates, 5 Wheat. 184, 201; Roberts v. S., 2 Tex. Ap. 4; S. v. Murphy, 47 Mo. 274.

CHAPTER XXXI.

COMPELLING THE PROSECUTOR TO ELECT ON WHAT ALLEGATION OR EVIDENCE HE WILL ASK A VERDICT.

Consult—the last three chapters and the next one; also the chapter on quashing, post, § 757a et seq.; and that on the trial, post, § 959g et seq.

§ 454. 1. **The Doctrine of this Chapter**—is, that since the prosecuting officer has drawn the indictment and planned the evidence after his own pleasure, with no opportunity for the defendant to object, the judge at the trial will so restrict this officer in respect both of the allegations and proofs, as, by compelling him to choose between two or more otherwise permissible lines of attack, to avoid confusion and injustice to the defence.

2. **Judicial Discretion.**—We have seen,[10] that this compelling of an election pertains rather to judicial discretion than to absolute law. So that in most of our States the determination of the judge thereon will not ordinarily be revised by the higher tribunal.[11] In some states it will,—perhaps under special circumstances in all.[12]

10. Ante, §§ 424, 425; Lemons v. S., 97 Tenn. 560, 37 S. W. 552.

11. P. v. Baker, 3 Hill (N. Y.), 159; S. v. Woodward, 21 Mo. 265, 266; S. v. Leonard, 22 Mo. 449; Bailey v. S., 4 Ohio St. 440; Johnson v. S., 29 Ala. 62, 65 Am. D. 383; Weinzorpflin v. S., 7 Blackf. 186; Nelson v. P., 23 N. Y. 293; C. v. Slate, 11 Gray, 60; C. v. Davenport, 2 Allen, 299; Josephine v. S., 39 Miss. 613; S. v. Hood, 51 Me. 363; S. v. Jackson, 17 Mo. 544, 59 Am. D. 281; Dantz v. S., 87 Ind. 398; Beaty v. S., 82 Ind. 228; P. v. Reavey, 38 Hun, 418; Ruth v. S., 140 Wis. 373, 122 N. W. 733; Presley v. S., 61 Fla. 46, 54 So. 367; S. v. Cannon, 232 Mo. 205, 134 S. W. 513; Krause v. S., 88 Neb. 473, 129 N. W. 1020; S. v. Piscioneri, 68 W. Va. 76, 69 S. E. 375; S. v. Rountree, 80 S. C. 387, 61 S. E. 1072; S. v. Richmond, 186 Mo. 71; S. v. Carragin, 210 Mo. 351, 109 S. W. 553.

12. Post, § 761; New Crim. Law, I, § 1041; Rex v. Galloway, 1 Moody, 234, 236; Cochran v. S., 30 Ala. 542; and cases cited in sub-

3. **How Chapter divided.**—We shall consider this subject, I. As to the Counts; II. As to the Transaction; III. The Time to elect.

I. *As to the Counts.*

§ 455. 1. **Quashing,**—whereby a part of the indictment is stricken out, is one of the methods of compelling the prosecuting power to proceed on the remaining part.[13] It is resorted to when the judge deems that counts or offences have been joined in a way to prejudice the defence at the trial.[14] The motion to quash is addressed to the judicial discretion, not ordinarily revisable by the higher tribunal.[15] Or—

2. **Separate Trials**—on the respective counts or clusters of them, each trial for a distinct transaction, may be ordered.[16] Or—

§ 456. 1. **A Nolle Prosequi,**[17]—if the attorney for the State chooses to abandon a part of the indictment, may be by him entered before trial to any count or part of a count.[18] Or—

2. **He may voluntarily proceed**—only on counts he selects.[19]

§ 457. **Distinctions.**—Returning to the election which the court compels, we have such differences as,—

1. **Felony and Misdemeanor**—are on this question dis-

sequent sections of this chapter.

13. Post, § 757a et seq; Betts v. S. (Tex. Cr. App. 1909), 124 S. W. 424.

14. Ante, §§ 425, 442 (2), 449 (8); Mayo v. S., 30 Ala. 32; S. v. Smith, 8 Blackf. 489; Engleman v. S., 2 Ind. 91, 52 Am. D. 494; Weinzorpflin v. S., 8 Blackf. 186; Sarah v. S., 28 Miss. 267, 61 Am. D. 544; S. v. Reel, 80 N. C. 442.

15. Ante, § 114; post, §§ 761-774; Cash v. S., 10 Humph. 111, 114.

16. Ante, § 425, and cases there cited; post, § 458. But see Flanagan v. S., 19 Ala. 546.

17. Post, §§ 1387-1396.

18. New Crim. Law, I, § 1014 (4); S. v. Lee, 228 Mo. 480, 128 S. W. 987.

19. S. v. Jones, 5 Ala. 666; Burk v. S., 2 Har. & J. 426.

tinguishable;[20] except where, as already explained,[21] different felonious transactions may be joined the same as in misdemeanor. Thus,—

2. **In Felony,**—in States wherein the combined counts are restricted to one felonious transaction,[22] the prosecution will be required to confine its evidence to some particular transaction which it selects.[23] Where the counts are for different felonies really or supposed to be connected with the one transaction,—as, larceny and receiving stolen goods,[24] or larceny and abetting the same,[25] or embezzlement and larceny,[26] or making a forged writing and uttering it,[27] or one felony in different degrees,[28]—and, *a fortiori*, where one felony is set out in various ways in the different counts to meet diversities in the proofs,[29] no election of

20. S. v. Kibby, 7 Miss. 317. Definitions of felony and misdemeanor. S. v. Biggs (Or. 1908), 97 Pac. 713.

21. Ante, §§ 450, 451. Assault with intent to kill. Chowning v. S., 91 Ark. 503, 121 S. W. 735.

22. Ante, § 449 (2).

23. Rex v. Young, Russ. & Ry. 281; S. v. Nelson, 14 Rich. 169, 94 Am. D. 130; Reg. v. Lonsdale, 4 Fost. & F. 56; Toomer v. S., 112 Md. 285, 76 Ap. 118; S. v. Jones, 86 S. C. 17, 67 S. E. 160; post, § 459.

24. S. v. Hogan, R. M. Charl. 474; Reg. v. Beeton, 1 Den. C. C. 414, 2 Car. & K. 960, 3 Cox C. C. 451; Hampton v. S., 8 Humph. 69, 47 Am. D. 599; Dowdy v. C., 9 Grat. 727, 60 Am. D. 314; S. v. Sutton, 64 Mo. 107; S. v. Morrison, 85 N. C. 561; Andrews v. P., 117 Ill. 195, 7 N. E. 265; Kennegar v. S., 120 Ind. 176, 21 N. E. 917. But see Rex v. Flower, 3 Car. & P. 413 and S. v. Richmond, 186 Mo. 71, 84 S. W. 880.

25. Corley v. S., 50 Ark. 305, 7 S. W. 255. See C. v. Mullen, 150 Mass. 394, 23 N. E. 51.

26. S. v. Porter, 26 Mo. 201. Contra. S. v. Finnegan, 127 Iowa, 286, 103 N. W. 155.

27. P. v. Kemp, 76 Mich. 410, 43 N. W. 439.

28. P. v. McCarthy, 110 N. Y. 309, 18 N. E. 128.

29. McGregg v. S., 4 Blackf. 101, 103; Dill v. S., 1 Tex. Ap. 278; Lanergan v. P., 39 N. Y. 39; S. v. Jackson, 17 Mo. 544, 59 Am. D. 281; O'Brien v. P., 48 Barb. 274; P. v. Satterlee, 5 Hun, 167; Reg. v. Davis, 3 Fos. & F. 19; S. v. Cook, 20 La. Ann. 145; S. v. Manluff, 1 Houst. Crim. 208; S. v. Smith, 24 W Va. 814; Burt v. S., 159 Ala. 134, 48 So. 851; Curtis v. S., 89 Ark. 394, 117 S. W. 521; S. v. Hensley, 75 Ohio, 255, 79 N. E. 462; Robinson v. S., 56 Tex. Cr. App. 62, 118 S. W. 1037; S. v. Williams, 191 Mo. 205, 90 S. W. 448; Higbee v. S., 74 Neb. 331, 104 N. W. 748.

may be set out in different forms in more counts than one—on a single trial. But the doctrine of the English and most American courts is the direct reverse of this; namely, that if a man has been engaged in a course of unlawful conduct resulting in a hundred legally distinct, petty offences, and the executive officers of the government have determined to exercise their right, not controllable by the judiciary, to bring him to trial for all, it is a piece of sheer oppression to him to compel them to find against him a hundred indictments, and require him to stand his trial a hundred times, instead of answering to all at once.[34] Moreover, on broader

34. In the Southern Law Review for April-May, 1877, Vol. III, n. s., 50, is an article, afterward published separately in a pamphlet, wherein I express some views concerning Tweed's Case. I do not propose to repeat that article bodily here, but some repetitions cannot be avoided. Tweed had been charged, in two hundred and twenty counts, with as many neglects of official duty in violation of a statute,—separate offenses committed in one course of criminal conduct,—and the jury had found him guilty of two hundred and four of these offenses. The trial court imposed separate sentences for the several offenses; for each of the first twelve, to the full extent of the law, the rest being graded down. After suffering the penalty on one count, he brought a writ of habeas corpus to be discharged from prison; claiming that the trial court could inflict on him no greater punishment than the law permitted for one offense, so that by its sentence on the first count it exhausted its jurisdiction. The New York Court of Appeals concurred in this view, and set him at liberty. Its opinion throughout is a novelty in the law. It does not absolutely deny jurisdiction to try more offenses than one at a single hearing before a jury; but it claims that, after a conviction, only one punishment can be inflicted, which the court may impose on one count, or divide among the counts, as it pleases. I never saw any other case—I do not believe anybody else ever did—in which this exact distinction was made. It rests on no statute, on no common-law usage; it is a deduction solely of reason. And a principal reason assigned is the hardship to the prisoner of making him stand his trial for more offenses than one at a time; the ordinary deduction from which premise, if admitted, would be, not that he can be made to suffer only one punishment for all the offenses, but that he can be punished for only one. Yet such is not the court's deduction, which is, to repeat, that he may be punished for all, but the sum of all shall not exceed what is allowable for one. Now, if the grand jury had found against Tweed two hundred and twenty separate indictments, and the State's attorney

views, some deem, the author submits rightly, that the joining in proper cases of distinct misdemeanors in one indict-

had compelled him to stand trial two hundred and twenty times, consuming more than ten years of constant attendance on the court, feeing lawyers and witnesses, this, we are to understand, would have been, according to the New York Court of Appeals, exact justice! This would have been no oppression to the prisoner! It is justice not only to the guilty, but to the falsely accused! There is no escaping the proposition that this is the exact justice of the law, if the court is right. No court can refuse to entertain a suit, criminal or civil, which the law-making power has authorized. And where this power has made two hundred and twenty offenses of what a man has done, and fixed the punishment for each, a court cannot both decline to punish him more heavily for all than the law has provided for one, and also refuse to entertain two hundred and twenty separate indictments. I need not say that elsewhere than in New York, the doctrine of this case, acted upon, would be a perversion of justice not to be endured by civilized man. How is it in civil jurisprudence? If one gets from his butcher a leg of mutton every Saturday for a year and does not pay, the court does not tell the butcher to bring fifty-two suits and recover the value of a leg of mutton and costs of court and of witnesses on each; or, at his election, bring one suit, and recover his costs and the value of one leg. No; it suffers him to bring only one suit, and in the one permits him to have his full damages, yet only one bill of costs. And this principle, which forbids one needlessly to harass another whom he accuses of having neglected a duty or done a positive wrong, pervades our entire system of civil jurisprudence. Turner v. Davies, 2 Saund. (Wms. Ed.) 148g, 150 and note; Nutton v. Crow, 10 Mod. 171, 173; Guernsey v. Carver, 8 Wend. 492, 24 Am. D. 60; Johnson v. Pirtle, 1 Swan (Tenn.), 262, 264; Biddle v. Ramsey, 52 Mo. 153; Oelrichs v. Spain, 15 Wall. 211; Moran v. Plankinton, 64 Mo. 337; C. v. McCulloch, 15 Mass. 227. A Mississippi statute subjected a neglect to put up the sign "Look out for the Locomotive" to the penalty of five dollars. And when a man had incurred the penalty thirty-two times, he was proceeded against in thirty-two separate suits. The court refused to sustain this proceeding; Peyton, C. J., saying. "The law abhors a multiplicity of suits, and therefore the legislature cannot be supposed to authorize a violation of this wise and salutary maxim, by allowing many suits when one will subserve all the purposes of justice, give the plaintiff all he is entitled to, and protect the defendant against unnecessary litigation and onerous costs which would necessarily result from a separate suit for each penalty, after all had been incurred." Mobile and Ohio Rld. v. S., 51 Miss. 137, 139. Such is the principle which, in ordinary circumstances,

ment, their trial at one hearing before the petit jury, and the punishing of each as though on a separate indictment, are essential to the administration of real justice,[35]—in some cases essential as protecting the accused from the over-burden of needless trials, in others as saving the courts from being blocked by them to the utter suspension of public justice. So plain is all this, that, by many of the judges, even the authority to compel an election of counts in misdemeanor is denied,[36] while others say that, in practice, it "is never done."[37] The better view, however, evidently is, that the authority exists, yet it should be exercised cautiously and only in those special cases wherein otherwise some right or interest will be put in peril.[38] But—

ought also to guide the court on the question of enforcing an election where the form of proceeding is by indictment. As in civil procedure an incongruous or prejudicial joinder of causes of action will not be allowed, so it should not be, and is not, in criminal. But where the accusations in the several counts are congruous, and especially where they set out a series of related wrongs, and more especially where the same evidence is largely applicable to all the counts, a considerate court will demand that all be tried and punished together. Even if separate indictments are found, they should be consolidated—ante, § 421 (1)—into one trial.

35. S. v. Tuller, 34 Conn. 280.

36. P. v. Costello, 1 Denio, 83, 90; C. v. Manson, 2 Ashm. 31; S. v. March, 1 Jones, N. C. 526; S. v. Kibby, 7 Mo. 317; Rex v. Jones, 2 Camp. 131; U. S. v. Devlin, 6 Blatch. 71; Gage v. S., 9 Tex. Ap. 259.

37. S. v. Kibby, 7 Mo. 317. In another case, Wash, J., said: "In the case of offenses inferior to felony, the practice of calling on the prosecutor to elect on which charge he will proceed, does not exist, and the prosecutor may give evidence of several libels, assaults, etc., upon the same indictment, whether they be on the same or on different persons." Still the power to compel an election was admitted, for he added: "The rule is that offenses of a different character or degree, upon which the judgments must necessarily be different, are not to be joined." Storrs v. S., 3 Mo. 9. And see Armstrong v. S., 28 Tex. Ap. 526, 13 S. W. 864; S. v. Morris, 45 Ark. 62.

38. Reg. v. Fussell, 3 Cox C. C. 291; Boyd v. S., 7 Coldw. 69; Reg. v. Davies, 5 Cox C. C. 328; C. v. Malone, 114 Mass. 295; C. v. Edds, 14 Gray, 406; Cook v. P., 2 Thomp. & C. 404; Reg. v. Burch, 4 Fost. & F. 407; Reg. v. Braun, 9 Cox C. C. 284; S. v. Nelson, 29 Me. 329; Cheek v. S., 38 Ala. 227; Tompkins v. S., 17 Ga. 356; C. v. Malone, 114 Mass. 295. And see Miller v.

of several felonies committed in one transaction,[45] or so mixed that they cannot well be separated.[46] So,—

4. **Particulars of Transaction.**—Where the prosecutor, not claiming to introduce proofs of more transactions than one, relies on various particulars of the one, ordinarily the court will not compel him to elect between them;[47] as, for example, where a felonious assault is charged as committed with various weapons, no election of the weapon to be proved will be required.[48] Or if the name of the owner of a stolen chattel is alleged to be unknown, and the proof shows it to belong to one or the other of two persons, the prosecuting officer will not be compelled to choose between the two.[49] For a sort of middle case,—

5. **In Arson,**—where the indictment was in five counts for the burning of five houses in a row, the property of five owners, and it was opened to the jury that all was from a fire set to one, Erskine, J., would not compel the prosecutor immediately to elect for which house to proceed. "As it is all," he said, "one transaction, we must hear the evidence. . . . . I shall take care that as the case proceeds, the prisoner is not tried for more than one felony."[50]

§ 460. 1. **In Misdemeanor,**—since there can be no proof without allegation, one can be convicted of no more offences than there are counts, nor can there be evidence of more.[51] So that if there is but one count, then one offence is shown, the prosecutor cannot add proof of another committed in a separate transaction.[52] For now his election is presum-

45. Rex v. Thomas, 2 East P. C. 934; P. v. Weil, 243 Ill. 208, 90 N. E. 731; S. v. Piscioneri, 68 W. Va. 76, 69 S. E. 375. And see C. v. Bennett, 118 Mass. 443.

46. Reg. v. Hinley, 2 Moody & R. 524; Van Sickle v. P., 29 Mich. 61; P. v. Peters, 241 Ill. 273, 89 N. E. 704.

47. S. v. Bishop, 98 N. C. 773, 4 S. E. 357; Gonzales v. S., 5 Tex. Ap. 584; Sharp v. S., 15 Tex. Ap. 171; Ruth v. S., 140 Wis. 373, 122 N. W. 733.

48. Williams v. S., 59 Ga. 400.

49. Black v. S., 83 Ala. 81, 3 Am. St. 691, 3 So. 814.

50. Reg. v. Trueman, 8 Car. & P. 727. See also Reg. v. Bleasdale, 2 Car. & K. 765.

51. Hodgman v. P., 4 Denio, 235.

52. Reg. v. Gordon, 1 Cox C. C. 259; Stockwell v. S., 27 Ohio St. 563; P. v. Jenness, 5 Mich. 305,

ably made. And still this doctrine is not absolute, either in its nature or in its application in practice. It is believed to be the better course, both in misdemeanor and in felony, to hold the implication of an election conclusive only when the proof introduced is full, or is accompanied by words or conduct reasonably inducing the belief that in fact it was so meant.[53] Consequently an election in terms is often ordered.[54] Again,—

2. **Another Transaction,**—in part or in full, may be of a sort to illumine the one in controversy; so that proof of what is relevant therein will be admissible,—a doctrine to be explained further on.[55] Again,—

3. **In Continuing Offences,**—where the doings on different days may be regarded as parts of the one transaction, the combined acts on all the days may be shown, and there will be no cause for election.[56]

327; P. v. Hopson, 1 Denio, 574; Lovell v. S., 12 Ind. 18, 20. See also S. v. Bates, 10 Conn. 372.

53. And see post, § 461.

54. Rex v. Smith, Ryan & Moody, N. P. 295. Where, on an indictment in one count charging an embezzlement of a sum on a given day, it appeared that money which might have been embezzled was received on different days, the prosecutor was ordered to select some one transaction on one day, and rely upon it. Rex v. Williams, 6 Car. & P. 626. Of a like sort is C. v. Bennett, 118 Mass. 443. But see, to the contrary, Gravatt v. S., 25 Ohio St. 162. Two persons being jointly indicted for obstructing a highway, and no joint act appearing in the proofs, the prosecutor on closing his evidence was directed to elect against which of the defendants he would ask for a verdict. Rex v. Lynn, 1 Car. & P. 527. So, where two were jointly indicted for a conspiracy and a libel, and against both there was evidence of the conspiracy, but against one there was none of the libel, the judges put the prosecutor to elect, before the defence was entered upon, on which charge he would ask for a conviction. Reg. v. Murphy, 8 Car. & P. 297; P. v. Costello, 1 Denio, 83. If, in larceny, it is probable the goods were not stolen all at one time, yet possibly they were, the prosecutor will not be compelled to select the articles for the verdict. Rex v. Dunn, Car. Crim. Law (3d Ed.) 82.

55. Post, §§ 1121-1129.

56. Etress v. S., 88 Ala. 191, 7 So. 49; Memmler v. S., 75 Ga. 576; Beasley v. S., 59 Ala. 20; Sharp v. S., 15 Tex. Ap. 171. See S. v. Chicago, etc. Ry., 77 Iowa, 442, 42 N. W. 365; S. v. Dean, 148 Iowa, 566, 126 N. W. 692.

III. *The Time to elect.*

§ 461. 1. **After the Trial,**—if no election has been asked, it is too late for the defendant, who by this tacit admission has suffered nothing, to complain. For example, judgment will not be arrested,[57] More especially,—

2. **When, and What must precede.**—Though compelling an election is often a remedy concurrent with the motion to quash,[58] it is not always so. The latter proceeds on the record alone; the former, not necessarily but commonly, on the record explained or augmented by statements of counsel to the jury, or by preliminary proofs, or both. If the record does not alone show an occasion for election, the trial must proceed till such occasion appears; and then, or after further steps before the reason for it has ceased, the motion to compel the election should be made, and the decision rendered thereon. Now,—

3. **By Implication,**—at a time which will vary in the different cases, the prosecuting officer sometimes elects; as, where he introduces proof which fixes the time and the occasion, in the manner already explained.[59] For example, if on a charge of a single assault and battery, the State introduces evidence of one instance, it has thereby elected its time and occasion, and cannot proceed to prove a second instance and ask a conviction therefor.[60] Such is one view of the question; but by other opinions, while the State may

57. S. v. Reel, 80 N. C. 442; Mitchell v. P., 24 Colo. 532, 52 P. 671.

58. Ante, § 455 (1); post, § 758, 773; Smith v. S., 8 Lea, 386; S. v. Parish, 104 N. C. 679, 10 S. E. 457; S. v. Phillips, 104 N. C. 786, 10 S. E. 463; S. v. Shores, 31 W. Va. 491, 13 Am. St. 875, 7 S. E. 413.

59. Ante, § 459 (1, 2), 460 (1). To offer proof and fail does not bring the case within this principle. S. v. Czarnikow, 20 Ark. 160.

60. Richardson v. S., 63 Ind. 192. More or less distinct to the like effect are P. v. Jenness, 5 Mich. 305, 327; P. v. Hopson, 1 Denio, 574; Lovell v. S., 12 Ind. 18; Mershon v. S., 51 Ind. 14; Elam v. S., 26 Ala. 48, 2 Greenl. Ev., § 86; Stanet v. Pricket, 1 Camp. 473; Gillon v. Wilson, 3 T. B. Monr. 216; Cochran v. S., 30 Ala. 542, 546, 547; Smith v. S., 52 Ala. 384.

presiding judge, to be exercised with reference to the special facts.[67]

§ 462. **In Conclusion,**—the doctrine of this chapter is less distinct in the books than one could wish; partly because it is difficult to reduce discretion to rule, and partly because judicial opinions on such a subject cannot in the nature of things be in complete harmony. It is believed that in most cases justice is best promoted where the judge permits the witnesses to go far enough to identify a transaction before compelling the election. What is chiefly to be avoided, while the evidence for the State is being introduced, is to prevent the defendant being prejudiced with the jury by testimony indicating crimes for which he is not indicted, and to which he is not to answer. But whatever is done at the early stages of the trial, plainly, as a general rule, the election should be required before the prisoner opens his defence.

67. A consultation and comparison of the following cases will perhaps further elucidate these questions. S. v. Nagle, 14 R. I. 331; C. v. Hogarty, 141 Mass. 106, 4 N. E. 831; Glover v. S., 109 Ind. 391, 10 N. E. 282; Busby v. S., 77 Ala. 66; Reg. v. Brannon 14 Cox C. C. 394; S. v. McNeill, 93 N. C. 552; Smith v. S., 8 Lea, 386; S. v. Lockwood, 58 Vt. 378, 3 A. 539; Tiedke v. Saginaw, 43 Mich. 64, 4 N. W. 627; S. v. Smalley, 50 Vt. 736; S. v. Crimmins, 31 Kan. 376, 2 P. 574; S. v. O'Connell, 31 Kan. 383, 2 P. 579; Baker v. S., 25 Tex. Ap. 1, 8 Am. St. 427, 8 S. W. 23; Crawford v. S., 86 Ala. 16, 5 So. 651.